TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON, PETITIONER,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1934.

CERTIORARI GRANTED OCTOBER 22, 1934.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON, PETITIONER,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX.

	Original	Print
Proceedings in U. S. C. C. A., Eighth Circuit	A	1
Caption (omitted in printing)	A	
Record from D. C. U. S., District of Minnesota	1	1
Stipulation and order transferring cause from third to fourth division of district	1	1
Complaint	2	2
Answer	4	4
Bill of exceptions	5	5
Caption	5	5
Appearances	5	5
Testimony for plaintiff	5	5
Glen D. Swinson	5	5
Stephen C. Lush	11	13
Testimony for defendant	15	17
S. V. Dickey	15	17
Donald L. Schultz	17	19
Robert J. Wilcox	19	22
John M. Ryan	20	24
Eugene N. Myers	33	38
George M. Welch	35	40

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 15, 1934.

—5652-C

	Original	Print
James J. Mealey	36	42
Charles T. DeWitt	38	44
Arthur J. McCann	39	45
Samuel J. Dunlap	40	46
Julius William Johnson	41	47
Arthur Nelson	41	48
Edward B. Stanley	42	48
Ray J. VanBaum	43	49
Charles H. Wilcox	43	49
Harry B. Hanson	44	50
John R. Gilchrist	44	51
J. Harold Remick	45	52
G. J. Conklin	47	53
Plaintiff's rebuttal	47	54
Blanche D. Swinson	47	54
Walter Irwin	48	54
Stephen C. Lush (recalled)	53	60
Robert J. Smith	55	63
Brink B. Murphy	57	65
James S. McFarland	57	65
Reginald J. Williams	58	66
James R. Vaughn	60	68
Jens P. Jensen	61	70
H. G. Ottinger	62	70
Motion for directed verdict	63	72
Directed verdict for defendant	63	72
Statement by the court	63	72
Exceptions to court's rulings	67	76
Stipulation for approval of bill of exceptions	68	77
Order settling bill of exceptions	68	77
Plaintiff's Exhibit A—Photograph	69	79
Defendant's Exhibit 8—Photograph	71	80
9—Photograph	73	81
10—Photograph	75	82
11—Photograph	77	83
Stipulation and order for treatment of Defendant's Exhibit No. 12 as exhibit of material	79	84
Defendant's Exhibit 13—Photograph	81	85
14—Photograph	83	86
15—Photograph	85	87
16—Photograph	87	88
17—Photograph	89	89
19—Photograph	91	90
20—Photograph	93	91
21—Photograph	95	92
22—Photograph	97	93
23—Photograph	99	94
24—Photograph	101	95
25—Photograph	103	96
27—Photograph	105	97
28—Photograph	107	98
31—Photograph	109	99
32—Photograph	111	100

	Original	Print
Judgment for defendant	113	101
Order allowing appeal	113	102
Petition for appeal	114	102
Assignment of error	114	103
Bond on appeal.....(omitted in printing)..	115	
Citation and service.....(" " ")..	117	
Order enlarging time under citation	118	104
Order enlarging time under citation	118	104
Order enlarging time under citation	118	104
Order enlarging time under citation	119	105
Stipulated præcipe for transcript of record on appeal..	119	105
Clerk's certificate .....(omitted in printing)..	120	
Appearances of counsel.....(omitted in printing)..	121	
Order of submission.....(" " ")..	122	
Opinion, Sanborn, J.	123	107
Judgment	132	115
Clerk's certificate .....(omitted in printing)..	133	
Order allowing certiorari	134	115

[fols. ½ & "A"] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

No. 3151

Law

G. D. SWINSON, Plaintiff,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Defendant

STIPULATION AND ORDER TRANSFERRING CAUSE FROM THIRD TO FOURTH DIVISION OF DISTRICT—Filed in the District Court, Third Division, February 6, 1933. Filed in the District Court, Fourth Division, Feb. 10, 1933

It is hereby stipulated by and between the parties to the above entitled action that the venue thereof may be changed from the United States District Court, District of Minnesota, Third Division, to the United States District Court, District of Minnesota, Fourth Division, and that the clerk of the United States District Court at St. Paul, Minnesota, may transfer all files in his office in said matter to the clerk of the United States District Court at Minneapolis, Minnesota.

Dated this 30th day of January, 1933.

Tom Davis, Ernest A. Michel, Carl L. Yaeger, Plaintiff's Attorneys. William T. Faricy, Warren Newcome, Alfred E. Rietz, Defendant's Attorneys.

Pursuant to the above stipulation,

It is ordered, that the venue of the above entitled action be changed from the United States District Court, Third Division, to the United States District Court, District of Minnesota, Fourth Division, and that the clerk of the United States District Court at St. Paul, Minnesota, is authorized and directed to transfer all files in his office in

said matter to the clerk of the United States District Court at Minneapolis, Minnesota.

Dated this 4th day of February, 1923.

Matthew M. Joyce, Judge of the United States District Court.

[fol. 2] IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed In Third Division, Jan. 5, 1933. Filed in Fourth Division Feb. 10, 1933

Plaintiff, for his complaint in the above entitled action, alleges and shows to this court:

1st: That the defendant now is and at all times herein mentioned has been a railway corporation, duly organized and existing under and by virtue of the laws of the state of Wisconsin, and as such operating lines of railway in the states of Minnesota, South Dakota, and other states, hauling freight and passengers thereon as a common carrier for hire.

2nd: That on and previous to the 17th day of September, 1932, the above named plaintiff was employed by the defendant as its agent and servant, and as a railway freight brakeman, and as such it was his duty to do and perform the work ordinarily and commonly done by railway freight brakemen.

3rd: That at all times herein mentioned the defendant was an interstate carrier and was engaged in interstate transportation and commerce, and that plaintiff was employed by defendant as its servant and employee, and as such was working and engaged in interstate transportation and commerce at the time of receiving the injuries herein set forth.

4th: That this action arises under the laws and statutes of the United States and is governed by the Federal Employers' Liability Act of Congress of April 22nd, 1908, 35 Statutes at Large 65, Chapter 149, as amended by the Act of April 5th, 1910; that the defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, was at the time of the commencement of this action and had been for several years doing business in the state of Minnesota, and in the

county of Hennepin, in said state, and in the district wherein this action is commenced; that because this action is based on a law of the United States, and because of the provisions of said Act of April 5th, 1910, this court has jurisdiction of the parties and of the cause of action herein.

5th: That on or about the 17th day of September, 1932, while plaintiff was so employed by defendant as aforesaid, he was working on and about certain of defendant's railway tracks in the city of Mitchell, in the state of South Dakota; that at said time it became necessary for him to be upon and to work upon and about a certain railway car of the defendant's known as a tank car; that under the laws of the United States it was the duty of said defendant to equip and maintain said tank car with certain running board and with certain ladders and handholds fastened to said running board and at each end of said car; that while plaintiff was so employed as aforesaid and at said time [fol. 3] and place while acting within the scope and course of his duties and within the line of his employment, it became necessary for him to be upon and to use the running board and one of the ladders and handholds forming a part of said railway tank-car; that at all times herein mentioned and previously thereto, the defendant negligently, recklessly and carelessly and contrary to the laws of the United States in such cases made and provided and contrary to the provisions, directions and orders of the Interstate Commerce Commission, made pursuant to said laws of the United States, did have upon said railway tank-car a running board, ladder and handhold which were rotten, loose, broken, defective and insecure; that plaintiff attempted in the usual and customary manner to use said ladder, handhold and the running board to which the same were fastened while he was working as hereinbefore set forth and that because of the negligence of the defendant and the violation of said laws of the United States and the rules and orders of the Interstate Commerce Commission, said ladder, handhold and running board, while plaintiff was attempting so to use the same, did break and give way and that as a result thereof, plaintiff was thrown from said tank-car to the ground and sustained the serious injuries hereinafter set forth.

6th: That by reason of all the acts of negligence as herein set forth, plaintiff was severely injured in and about his

head, neck, back and spine; that certain of the wheels of said car ran over his right foot and crushed, bruised and mangled the same so that plaintiff will have to undergo several surgical operations in an attempt to remedy said injuries and alleviate the pain he suffers therefrom and that said foot has been so severely injured that plaintiff has permanently lost the use thereof and that plaintiff is advised that the same will hereafter have to be amputated; that ever since being injured plaintiff has been confined to a hospital; that he has suffered excruciating pain and anguish from the injury to his foot, back and from the other injuries he sustained; that he suffered a severe nervous shock and that plaintiff is advised and believes that all of said injuries are permanent and that he will always suffer therefrom.

7th: That at the time of the injuries to plaintiff, he was an able-bodied man and could and did earn at his work as a railway freight brakeman approximately the sum of one hundred fifty ($150.00) dollars per month, but that by reason of his said injuries his earning capacity has been wholly lost and destroyed.

8th: That by reason of all the facts aforesaid, damages have resulted to plaintiff in the sum of fifty thousand [fol. 4] ($50,000.00) dollars.

Wherefore, plaintiff prays judgment against defendant in the sum of fifty thousand ($50,000.00) dollars, together with the costs and disbursements of this action.

Tom Davis, Ernest A. Michel, Carl L. Venger, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[File endorsements omitted.]

In United States District Court

Answer—Filed in the District Court, Third Division, January 25, 1933. Filed in the District Court, Fourth Division, Feb. 10, 1933.

Defendant, for its answer to the complaint herein:

I

Admits the first paragraph thereof, and that on or about September 17, 1932, the plaintiff while in the employ of de-

[illegible] as a trainman, sustained certain injuries at Mitchell, South Dakota.

III

[illegible] as herein admitted, defendant denies each and every allegation, matter and thing in said complaint contained.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment against plaintiff for its costs and disbursements herein.

William F. Farley, Warren Newcomb, Alfred H. Bright, Attorneys for Defendant, 175 East Fourth Street, St. Paul, Minnesota.

[illegible]

Bill of Exceptions.—Filed Feb. 16, 1914.

[illegible] it appears that the above entitled action came on before the court, the Honorable Joseph W. Molyneaux, judge, presiding, and a jury duly empaneled in said court at Minneapolis, Minnesota, on the 21st day of March, 1913.

The plaintiff appeared by his attorneys, Messrs. Davis, Kidd, Bangs & Webster, and the defendant appeared by its attorneys, Messrs. William F. Farley, Warren Newcomb and Alfred H. Bright.

Whereupon, such proceedings were had and evidence taken in said cause touching the question at issue therein, that it appeared without dispute from the pleadings that the plaintiff was an employee of the defendant and was working as such employee in the city of Mitchell, South Dakota, at the time of receiving certain personal injuries; that it was admitted by the defendant that plaintiff was working and engaged in interstate commerce and transportation at the time of receiving said personal injuries.

Glenn B. Swisher, the plaintiff, called in his own behalf, testified as follows:

I am 40 years old, married, was born at Claremont, South Dakota, have lived at St. James, Minnesota, for about 5

years, and before that at Sioux City, Iowa. I have had a high school education and my first work was with the railroad. I have worked for the Omaha Railway 14 years and 9 months as a brakeman and for several years last past my run was from St. James, Minnesota, to Sioux City, Iowa.

As a brakeman you have to pick up and set out cars, spot them at different places and set and release the brakes on cars. The work requires a brakeman to get on and off of cars, climb ladders, walk over the tracks and around the yards both day and night.

I was working for the company in September, 1932, as a freight brakeman and on September 17, 1932, went to work at 9:00 o'clock P. M. It was dark and we were making up a train of cars out of the yard at Mitchell, South Dakota, for Sioux Falls, Omaha, and points beyond. These cars were billed to go and we had to pick them up and get them into the train.

"Mr. Newcome: There is no dispute on that, if your Honor please. It is admitted that at the time of the accident, both the defendant and plaintiff were engaged in interstate transportation."

Just before I got hurt our engine had ahold of 3 cars, the car next to the engine was a box car, the next car a steel gondola and the next car an empty oil tank. The cars were headed west and the track ran east and west. I released the [fol. 6] brakes on all 3 cars. After I released the brakes on the gondola car I went to this oil tank car. I got on the east end of this car and walked on the north side of it to the west end of the car where the brake was.

Around the oil tank car was a running board probably 11 inches wide which ran on each side of the car and was joined by another running board at each end of the car, making a parallelogram. The brake was on the west end and it was my duty to release it. I am familiar with tank cars and the method and practice of releasing the brakes.

"Q. And you have had occastion to release the brakes, I presume, on oil tank cars, and on box cars and gondolas, thousands of times?

A. Yes, sir, I have."

This brake came up through the running board. It is nearly in the center of the car, just to one side of the draw

bar. At the top of the running board and around the brake rod there is a ratchet and fitting into that ratchet there is what is called a dog, which is an "S" shaped piece of iron that fits into the teeth of the ratchet to hold the brake tight or in place.

"Q. And what is the usual and ordinary way of releasing that dog—just tell the jury.

Mr. Newcome: If your Honor please, that is objected to as immaterial. I think he might tell what he did at that time.

Mr. Davis: Oh, I think it is proper.

The Court: The objection is overruled.

Mr. Newcome: Exception."

In releasing this brake it seemed to me that it was on the side and was hard to get at, and I had to get my foot on the inside, between the dog and the brake on the inside of the platform, which would give me very little room on an 11-inch plank. When I walked up there I took hold of the brake, and I saw that it was set tight, and I put my foot out on this grab-iron, which was fastened to the end of this running board. The bolts were right in the running board and I put my right foot on the grabiron and my left foot between the dog and the tank car. In releasing that brake I did it in the usual, customary and ordinary way. I have done that on hundreds of them in that way and have seen other brakemen operating it in the same way.

"Q. And in putting your foot on the grabiron, and releasing the brake, why did you put your foot on the grab-iron, and your other foot on the running board near the dog—just tell the court and jury.

"A. Why, the plank was so narrow, you could not get pressure enough to release the brake without getting your foot out there, to get some pressure to release your brake with,"

[fol. 7] The grabiron was on the end of the car and both ends of it are fastened to the running board with bolts which come through the running board on each end of this grabiron. After I was injured I noticed that the bolts pulled through from the top to the bottom of the running board.

The dog was not in the usual place. I had not found many dogs in that position and it makes them very diffcult to release. Exhibit "A" is a fair representation of the car in question except it seems as thought the brake staff on the car I was injured on came nearer to the west edge of the running board. The picture shows the dog in substantially the same position as on the car I was working on. I had to get my toe between the dog and the tank so as to release the dog, when I loosened the brake staff. After I had pulled the wheel around I used my foot to loosen the dog, that is, I pushed it in with my toe and as I was doing this I fell and was injured. I don't know; it seems as though this grabiron broke, and the brake came loose, and everything happened all at once.

"Q. Well, did the grabiron come loose—you know whether it did or not—don't you?

A. I certainly do know that it did.

Q. Well, tell the jury whether it did or not?

A. The grabiron came loose as I released the brake, and I fell down in front of the wheel on my back, across one of the rails.

Q. When the grabiron came loose, where you had your right foot, did you lose your footing?

A. Yes; there was nothing left to stand on."

I was thrown west, ahead of the car. There was another car beyond me and we were going back after another oil tank. After I was injured I was placed on the running board of the car where the grabiron came off. I had my lantern.

"A. I saw that the grabiron had been torn loose from that board and I did not pay any more attention to it until I got way up the street, where I was taken off, and then I looked at it, and there was a street light there—plenty of light.

Q. Then what did you find; tell the jury.

A. I found that the grabiron had been—the bolt had been pulled through the plank; it broke there."

The wood in this running board was in very poor condition. It was an old plank and it was not good wood, because it was rotten, I saw that.

The head of the bolt had worked—it seems as though it had worked nearly through the wood, and there was not much more there for it to hold it. It was nearly through the plank the way it looked to me. I worked as a freight brakeman during 1932 very little and I earned approxi- [fol. 8] $111.92. In 1931, I made $741.00 and in 1929, about $1,700, and in 1930, about $1,400.00 or $1,500.00.

Cross-examination.

By Mr. Newcome:

I was head brakeman on train 88 and our crew had spotted the two tank cars the morning of the accident. It was usual and customary for the head brakeman to release the brakes on the cars that we were to move. This was done generally in my work. The rear brakeman passes the signals and the head brakeman takes care of the brakes.

"Q. So that at all times, it would be your duty to let off and put on the brakes on the different cars?

A. Yes, sir.

Q. Did you put on the brake on this tank car, on the morning that you spotted it?

A. I did.

Q. And in putting on the brake, did you use this handhold for the purpose that you have mentioned?

A. Yes, sir, I did.

Q. You used the handhold?

A. Yes, sir.

Q. And so far as you could tell at that time was it secure?

A. I did not notice it; all I done was set the brake.

Q. Well, I asked you whether, in setting the brake on that morning, you used the handhold?

A. Yes, I did.

Q. You put your foot on it the same as you have testified in your direct examination?

A. Yes, sir.

Q. I am referring now to the morning when you set the car in, and set the brake.

A. I understand.

Q. You did use it?

A. Yes, sir.

Q. And you put your left foot up at the dog, as you have testified here, that is, in the same manner that you did when you released the brake?

A. Yes, sir.

Q. And you put your right foot over on this same grabiron?

A. Yes, sir.

Q. And did you apply an equal amount of pressure in setting the brake that you did, in letting the brake off?

A. Not always; I don't think I did; the wheels and brake shoes are warm when you set a brake.

Q. It does not take quite as much exertion, you mean, to set it as it does to let it off?

A. It depends on how your brakes set. Sometimes your brake shoe will climb on the wheel, and if you set the brake a half an inch, that will set the brake terribly tight; although it takes very little effort to put them on, it leaves them awful tight when you let them off."

The brake was not set on this car while the air was set. I set the brake while the car was moving. In order to get a [fol. 9] base or rest for my foot so that I could apply pressure in setting the brakes with my right foot I did put my foot on the grabiron but it did not take but very little pressure to set that brake; I remember that definitely. I did not notice anything insecure about the grabiron at that time. So far as I knew at the time I approached the west end of the car just prior to the accident the grabiron, brake and running board were in perfect condition.

On the gondola car I think there was a platform brake. That is where the brake extends up over the top of the car and where the ratchet and dog or pawl are located there is a small platform. I do not remember whether that was set tight or not. In releasing the brake on a gondola car you get upon the platform. In releasing the brake just prior to the accident I would put my left foot between the rear end of the dog and the tank and my right foot over on this grabiron. In order to release the brake you put your left foot back of the dog so that when you turn the wheel towards you sufficiently to take up the slack then you kick the dog out and the brake starts around the other way. Whether you would have the most pressure on your right foot out on this grabiron would depend in what posi-

tion you were in and how you stood. I think my pressure was equalized practically on both feet. "I do not think that I was putting any great amount of pressure on that grabiron with my right foot. It is more to get spread out so as to get a swing on your brake; you cannot do anything with your feet together on an 11-inch plank."

"Q. Well, you spread your feet out, so that you can get some resistance there on your right foot, don't you?

A. Yes.

Q. And, at some stage, you are pushing your right foot down and out on that grabiron, as you release the brake?

A. Yes, there is going to be some pressure with the right foot.

Q. Yes. In other words, that is why you are putting the foot there, so that you can have enough power to get the pressure, isn't it?

A. I was not looking for pressure there, so much as I was to get spread out, so that I could handle myself on the brake. Nobody can handle themselves with their feet together and try to release the dog, with the other foot."

I do not have to raise my left foot when I kick the dog out. It is flush or level with the floor and you make it with the toes. I do not know whether I would shift my weight from one foot to the other. If I have my weight on my left foot I can still move my toes and I can have the weight on my heel and move my toe, leaning forward on the brake, very easily. The running board was about 1½ to 2 inches [fol. 10] thick. I am not sure about that.

I think this grabiron on this car was about flush or level with the running board. I am not positive. The picture, Exhibit "A," shows that the grabiron is fastened on to the under side of the running board and, therefore, my right foot would be down whatever distance that is, whether it is an inch and a half or whatever it is, my right foot will be lower than my other one, just the width of the board that the grabiron is attached to. So that in the position I was in when I finally got ready to pull the brake wheel towards me, with my left foot up back of the dog, between the dog and the tank, my right foot was either an inch and a half or two inches below the surface of the running board or the same distance below my left foot. My right foot was flat against the grabiron, it laid right down

against that rod and my ankle, I imagine, was probably against the board where the grabiron is attached to. The grabiron extended out from the board from 2½ to 4 inches. I think I had my right foot out against the grabiron. The grabiron is about 18 or 20 inches long, and my right foot was against the middle of the grabiron. The grabiron is shaped like the letter "U" and I had my foot against the center of it. The pressure would be downward and possibly some outward—mostly downward. There would be a pressure both ways, more down than sideways, I am sure. The rung of the grabiron is about the size of my middle finger. The grabiron pulled out at the north end. It seemed as though the brake released at the same time I fell. It seemed like everything went at once. I had set my lantern on the platform so as to take hold of the brake to release it. As you face a car the brake is always on the left side, no matter which way the car is turned.

"Q. Well, now, if you happen to approach the brake from the right, you might release or set it from that side?

A. Yes, sir.

Q. You would not cross around over to the left to get on the other side?

A. It would be unnecessary work."

You sometimes find the dog on the right side of the brake. You will find more of them on the right side than you will on the left as this one was. I have found some of them there. I mean the position of the dog. I had to get my toe in between the ratchet and the tank. I don't mean that it would be clear around on the right side [illegible] you will find more of them on the side rather than in behind there. This will give you more leverage than if the dog is on the left side or right in behind the brake staff. In other words, some dogs are further out toward the [illegible] edge of the plank. Where this is true it is easier [illegible] because [fol. 11] it takes your body further away from the tank which would give you a swing on your brake. When you are crowded against the tank it doesn't give you much of a swing. I do not know the distance between the inside edge of the running board and the tank on this car. It seems to me it was built right up against it. I do not know as I never found a dog clear around on the right side of

the brake staff, and I don't remember of ever releasing a brake while standing on the right side of it.

STEPHEN C. LUSH, called in behalf of plaintiff, testified as follows:

I live in Chicago, Illinois, and formerly lived at Minneapolis, Minnesota. I was a brakeman for about three years, a conductor for about seven years and then I switched for about 11 months. I worked for the Northern Pacific and Omaha. I am at present employed as an investigator for the Legal Aid Bureau of the Brotherhood of Railroad Trainmen. I have been so employed for three years. I was formerly employed by Davis & Michel as investigator and investigated the happening of various accidents for them.

It was part of my work to examine cars and engines and obtain statements of the different witnesses. Previous to my employment by Davis & Michel for seven or eight years I was employed by George C. Stiles who, as well as Davis & Michel, has tried a good many personal injury cases. During the past three years, investigating accidents is all I have done. I work under instructions from Cleveland, and my territory covers everything west of Detroit, Michigan, Indianapolis, Indiana, to the western border of Montana and Oklahoma on the west and Tennessee on the east.

Mr. Swinson is a member of the Brotherhood of Railroad Trainmen, and shortly after this accident I went to Mitchell, S. D., to investigate the facts concerning same. I arrived there early in the morning of September 20, 1932, and on that day I saw the particular car and examined the handhold of the tank car which had broken off and examined the running board. The dog on the car I examined was around to the west farther than the one which appears on Exhibit "A." It was nearer the west end of the running board. The handhold was similar in design to the one shown on Exhibit "A." It was at one end of the car. Exhibit "M" shows the position of the handhold the same as on the car I examined.

"Q. Now, when you examined the handhold and running [fol. 12] board on the 20th of September, on this car in question tell the jury the condition of the wood in that running board, as to being solid or rotten.

A. The wood was badly cracked, not only at the place where the bolt was pulled through, where the handhold was fastened on, but also at the place where the bolt held the stirrup, which is a part of the ladder that you go up onto the car, and fastened under, at the side—one end of the stirrup was fastened to the same piece of plank that the handhold was fastened to, but farther in on the plank, and the plank at that point was broken so that there was a gap in the plank, I would say, of perhaps a quarter of an inch, and then, at the point where the bolt had pulled through, that is, the bolt that held the handhold on, the plank was torn and broken, and a piece of the wood, from the point where the bolt went through, out to the end of the plank, about half an inch wide, was broken out and gone. The wood where this piece was gone out of, or where the wood was splintered, where you could see it, was discolored. In most places, it was quite black, and in other places it was brown, and there was very little new break, except where the wood had splintered."

It was black, discolored and weather-beaten. At the time of my investigation I did not take a piece of wood of the running board but I found the piece of wood marked Exhibit "O" about 25 feet west of the place they called "Spot 216" where I was told this car was spotted at the time they first coupled onto it. I compared this piece of wood with the wood in the running board and fitted it into the space where the piece of wood was gone. Apparently there was some of that wood that was gone. There must have been some of the wood that had broken out of this one piece because it did not fill the crack that was left and this piece did fit in on one side.

"Q. And do you know then from fitting it in the running board whether this piece of wood came from that running board.

Mr. Newcome: That is objected to as calling for a conclusion of the witness.

The Court: The objection is sustained.

Mr. Davis: Exception.

Mr. Davis: We offer in evidence Plaintiff's Exhibit "O."

Mr. Newcome: That is objected to as no foundation laid.

The Court: The objection is overruled.

Mr. Newcome: Exception."

The grabiron pulled out entirely at one end, the outside end, and was hanging part way down.

"Q. You may state to the jury whether or not the condition in which you found this running board, as to its rotted condition, was such that an ordinary inspection would have [fol. 13] shown its defective condition.

Mr. Newcome: That is objected to as immaterial, in view of the fact that there is no claim here that this man fell, except by placing his foot in the handhold and pulled out the handhold. He did not fall because of any condition of the running board—with reference to service of that type, as a support for his feet, or as a place to walk on.

The Court: I don't think I quite grasp their proposition.

Mr. Davis: That is not the purpose of the question.

Mr. Newcome: There is no claim here that he stumbled and fell or that that running board gave way with him, except that he put his foot in the handhold and applied pressure to the handhold, and pulled out the handhold. The running board had no connection with his falling.

The Court: Well, as I understand it, the claim is that he stepped on—that he had his foot on this handhold, and the handhold was bolted to the running board, and that the pressure pulled the nut, or loosened it out of the running board at this place.

Mr. Davis: Yes, that is the claim. The claim is that the running board was so rotten and defective, that it was unsafe.

Mr. Newcome: That is true with reference to the handhold, but the running board is a place to walk and stand on. It is not used other than for the purpose of affixing the grabiron.

The Court (interrupting): Oh, I see your point. You will be permitted to argue it later. As I view the question now, I think the evidence is admissible.

Mr. Newcome: May I have an exception to the court's ruling?

The Court: Yes, exception allowed."

My judgment is that it could have been very readily discovered by anyone who was inspecting the car for the purpose of finding what its condition was. On the car in question the bolt holding the dog would be nearer the edge of

the plank than as is shown on Exhibit "A." That would bring the whole dog around toward the outer edge of the plank, and therefore make an angle of the dog, so as to engage the ratchet considerably different. The one in the picture is such that a person could stand on the end of the running board and on the side running board, and disengage the dog, where, on the car that I saw, the dog was around so much farther toward the edge of the platform, that you had to stand with your back to the west, in order to get your left foot back of the dog, to disengage it. If the brake was set up and he had to exert any pressure he had no other place to put his right foot than upon this grabiron. [fol. 14] I have placed an ink dot on Exhibit "A" near the edge of the end running board to indicate where on the car in question the bolt holding the dog went through the running board. I have made a letter "O" on Exhibit "N" just about the bolt which goes down through the middle of the dog (Exhibits "M" and "N" received in evidence).

Exhibit "N" shows substantially the position in which I found the grabiron on September 20th when I examined that car. It shows the gap at the north end of the running board in about 2 inches left by the wood having been torn out when the bolt pulled through. The bolt itself was through the running board, in about an inch and a half from the outer edge of this running board and in from the end 2 inches. When it pulled out the head of the bolt pulled down through but there was a piece of wood that broke out at the end. The bolt had pulled down through the running board first, downward and then out.

Cross-examination.

By Mr. Newcome:

My opinion is that this dog was located near the west edge of the running board, the outside edge, and for that reason that is why Swinson would put his foot down on the grabiron to get traction so that he could get some pressure on it. I believe, in putting his foot down on the grabiron, he would press down and out just as a man would stand on the floor or anything else, he would use that as a part of the running board. I do not think that you place an unusual force in the feet in turning the brake. It is done by swing-

ing the body. You take hold of the brake wheel with your hands and then swing your body and then use the weight of your body to turn the wheel around. I think that your weight is equally distributed in the feet and you just throw your body around. You would have your entire weight on your heel. You just move your toe in an inch to move the dog or disengage the dog. The running board was 11 inches wide and I imagine about nine feet long, although I did not measure it. The brake staff was in about four feet from the north edge of the running board.

I have not done practical railroading for longer than 13 years. I worked for the Omaha Railway six days in September, 1919, and was discharged because I did not report for work. I was doing work for the Brotherhood and was discharged by the Northern Pacific in 1916 for representing the Brotherhood.

[fol. 15] Redirect examination.

By Mr. Davis:

I was never discharged for the violation of my duties as a railroadman, it was because of my activities in the Brotherhood.

(Plaintiff rests.)

S. V. Dickey, called in behalf of the defendant, testified as follows:

I am agent for the Omaha Railroad at Mitchell, S. D., which position I have held for 3½ years. I have been employed by the Omaha since 1910. I was in charge of the station and grounds at Mitchell and I recall the accident in which Mr. Swinson was injured on the evening of September 17, 1932, and I came to the scene of the accident shortly after it happened. That evening I examined the car slightly but on account of the darkness I was unable to see much with a lantern. The next morning I made an examination of the car when it was on the house track just east of the freight house at Mitchell. The accident happened on what we term the west main line west of the

passenger station about two blocks and a quarter. At the point where the accident happened there are several oil storage plants and the west main line is used as the track from which to unload tank cars into these oil storage plants. I saw the car that night about 25 minutes after the accident and then made another inspection of it the next morning with car foreman Schultz. It is a part of my regular duties to make an inspection of cars that have been involved in accidents. From these inspections I found that the running board was split by the grabiron being torn out of the plank on the north end, the plank being split. The running board is a plank nine feet long, eleven inches wide and an inch and three-quarters thick. This grabiron is fastened onto the north end of this plank, the north end of the grabiron being set in two inches from the north end of the plank and the north end of the grabiron appeared to have been forced down and out—forcing it way through the plank and splitting the plank. The grabiron is bolted to the plank, that is, a hole is bored in the plank and then a bolt is fitted down in with the nuts on the under side and it is fastened at both ends in that manner. The grabiron is one inch in from the west edge of the plank and there is two inches of wood between it and the north edge of the plank. The split I observed appeared to be a fresh one. I could tell this because the wood was new and there was as much difference between the split, that is, comparing the [fol. 16] inside of that split with the outside of the plank that had been exposed to the weather—the difference in the color of the wood. Running boards that are exposed to the weather became weatherbeaten and gray in color.

Defendant's Exhibit "8" is a correct representation of the car as I saw it 25 minutes after the accident and also on the following morning and shows the position of the grabiron as I observed it those times. It also correctly shows the appearance of the split and break in the running board and the location of the brake and of the brake pawl on the running board. Exhibit "8" is a picture of the west end of this car. Looking into this picture the car is facing west and north would be to your left and south to your right. Exhibit "9" is a picture of the same car showing the southwest corner thereof. It shows the running board in question and the grabiron on the other side of the car. It also shows the brake on the west end of this car. Ex-

hibit "10" is a picture of what we term the west main line and Exhibit "10" is facing towards the east while Exhibit "11" is facing the opposite way. Spots 219 and 216 appear on Exhibit "11," and it was between these two spots that the oil tank in question was located when Mr. Swinson was injured. Exhibit "8" shows the hole where the bolt came through the running board (Defendant's Exhibits "8," "9," "10" and "11" received in evidence.) The bolt on the north end of this grabiron or handhold came through the board and out only by excess pressure. The split was in line with the bolt holes. The indications were that the bolt had pulled or been forced down through the split. At the time that this picture was taken, Mr. Schultz tried to put the bolt back alone by shoving up through where it came out of and he was not able to pull the split apart with one hand and still shove the bolt up with the other, and so Mr. Smock, our trainmaster, stepped up and pulled the split apart while Mr. Schultz shoved the bolt up in the same passage that it was pulled out of. At that time the handhold was bolted in at its south end.

Cross-examination.

By Mr. Davis:

I have indicated by the letter "H" on Exhibit "8" the top of the hole that the bolt came through.

[fol. 17] DONALD L. SCHULTZ, called in behalf of the defendant, testified as follows:

I am the car foreman of the defendant and live at Mitchell, S. D. I have been located at Mitchell about 2½ years and have been in the car department 11 years. I was car foreman at Mitchell on September 17, 1932. I am familiar with the tank car involved in the accident and saw it the morning before the accident. At that time it was spotted on the west main line west of the passenger station at Spot 219. I inspected this car on the morning of the 17th. I made the usual and customary inspection of this car, that is, of all parts of the car including the running gear, the safety appliances—all parts of the car, and found everything was in good serviceable condition. I inspected

the running board on the west end of this car and the handholds and brakes and it was in serviceable condition and I found nothing out of place or out of the way. In inspecting the safety appliances I do not take hold and put pressure on each safety appliance. My inspection consists of looking them over to see that everything is in place and in serviceable condition.

I made an inspection of the car the next morning in company with Mr. Dickey. The car at that time was located on the house track east of the freight house. I looked over and inspected the running board and the grabiron or handhold on the west end of the car, and found the running board split out and the bolt holding the end handhold torn through the split—tearing the running board. Defendant's Exhibit "8" shows the condition that I observed with relation to the running board and handhold when I made my inspection on the morning of September 18th in the daylight.

The running board was 11 inches wide, 1¾ inches thick, and was the usual and customary plank that is used for a running board at the end. It was nine feet long. On this particular type of a car the handholds are bolted to the running board with the head of the bolt on top of the running board, and the appliance, the handhold, applied beneath the board. It is 1¾ inches from the west end of the running board to the center of the handhold bolt hole, and from the north edge or end of the running board it was 2¼ inches to the center of the north handhold bolt hole, and there is two inches of wood between the bolt hole and the north edge of the running board. From the ground to the surface of the running board is approximately 42 inches and from the inside or easterly edge of the running board to the tank was 15 inches, or in other words, there is a 15 inch clearance between the inside edge of the running board and the tank.

[fol. 18] "Q. Now, when you examined this handhold and running board on the morning of the 18th, after the accident, you have stated that you found a split in the wood. Will you state whether or not that was a new or a fresh split?

A. Well, it was a new defect—a new split."

The break indicated that pressure had been used outward and downward. Facing the brake end of the car the brake

staff was located 20 inches from the center of the car and was about in the center east and west of the running board. The dog was located a little to the northeast of the center of the brake shaft, that is, to the side and rear of the brake shaft. The brake is set by turning the wheel around and winding the chain around the brake staff at the bottom. There is what is called a ratchet at the bottom of the brake staff on the top surface of the running board, and the pawl sets into the teeth on this ratchet when the brake is wound up, in a set position, and locks it. In order to release the brake it is necessary to disengage this pawl from the cogs, and to do this it is necessary to wind the brake up tight until there is enough leverage to release the dog from the ratchet and then the brake unwinds and the brakes are not applied. The purpose of winding your brake up is to apply the brake shoe to the wheel of the car. On this car there was what is called a safety railing attached to the tank and located 48 inches above the surface of the running board and this safety railing running around the side of the car appears on Exhibit "9." On this tank car there was a running board running clear around the car and that running board was of the same thickness and width as the running board on the end of the car. The ratchet and pawl of this brake are shown on Defendant's Exhibit "8." It was 34 inches from the pawl on this car out to the north edge of this running board and the pawl was about three inches from the inside or east edge of the running board and about eight inches out to the west end.

Cross-examination.

By Mr. Davis:

"Q. Mr. Schultz, I presume, in this inspection that you made that morning, you did not go up on this particular car, did you?

A. No, sir.

Q. Nor walk over this running board?

A. No, sir.

Q. And, I presume, you just looked at the safety appliances, and saw nothing hanging down, as defective, and passed it as serviceable?

A. Yes, sir.

Q. And did you look particularly at the west end of the running board that morning?

A. I made my usual inspection.

Q. Well, having made your usual inspection, have you [fol. 19] any recollection of particularly looking at the west end and edge of the running board?

A. I did not observe that particular board any more than any of the rest of the car."

A crack to the right of the brake staff on the running board would on most of the tanks be above your eye. I didn't partcularly notice any crack in the edge of the running board that morning. I notice in the photograph a crack of about two inches on either side of the bolt and that is what is called a weather crack. It may go in possibly an eighth of an inch.

ROBERT J. WILCOX, called in behalf of the defendant, testified as follows:

I live at Sioux Falls, South Dakota; have been employed by the Omaha Railroad for 24 years, as a locomotive fireman since 1909 and was promoted to locomotive engineer on September 19, 1914, and have been running as a locomotive engineer continuously since 1920. I was the engineer on Train 88 on the evening of the accident. This train runs between Mitchell and Sioux Falls, S. D. The accident happened on Saturday. We went to work at Mitchell at 9:00 o'clock that night and were to leave whenever we got our train made up. We arrived at Mitchell early that morning and as I remember it, set out two cars of oil and a car of coal on the west main. The tank car involved was spotted at Spot 216 and the other tank car of oil which was the west car of the two cars was spotted at Spot 219. Defendant's Exhibit "11" shows Spot 219. Right at Spot 219 the track begins to have what we call a water grade running east in the direction of the depot and Spot 219 is about three blocks west of the depot or main street.

After we started to work that night we took our engine out of the roundhouse, turned it and then went to the west main line and started making up the train, and it so happened that we coupled on to the gondola car first, then the next oil tank and then the next oil tank, and after we had coupled on to those three cars it was our intention to pull them out and make them a part of our train. The engine was headed east and the tender would be the first part of

the engine to come in contact with the gondola car. The tank car in question was located perhaps three-quarters of a block west of the gondola car and as we backed in to couple to the gondola car we were moving at from two to four miles an hour. I was on the right or south side of the engine as it headed east and I was taking the signals from the brakeman that night. Mr. Swinson rode the right back [fol. 20] corner of the tank over the crossings and until we made the first coupling and then climbed over into the gondola car after we coupled on to it, and I presume he was going to let the brake off and that is the last I saw of him. The brake on the gondola car was at its east end. After coupling to the gondola car we proceeded westerly at a speed of five or six miles an hour to couple on to this oil tank car and we would naturally slow down as were coupling on to the oil tank. That speed was usual and customary in that type of an operation. We coupled on to the oil tank cars and I did not see Mr. Swinson at that time. We then started west at a speed of two to four miles an hour to couple on to the most westerly tank car which was about 35 or 40 feet westerly. After we coupled on to the most westerly tank car the brakeman on my side swung us down and I saw him go around the westerly end of the most westerly tank car and then I learned Swinson had been injured. As we proceeded westerly to couple on to the last tank car there were no jars, jerks or rough handing. During all this time the conductor was at the depot, about 2½ blocks easterly and was not in a position to see the accident. Swinson was picked up by the other brakeman and the fireman and put on the running board of the car and taken to the depot and then to the hospital. I was in charge of the engine that night and was taking the signals. I did not examine the running board and handholds on the northwest corner of the car that night and any more than to just walk by it. I seen it as I walked by and the next Tuesday morning I happened to be walking by it and noticed it as I went by. You could see that there was a split in the running board and the handhold looked like it had been pushed down and out, as if there were pressure applied to it. Defendant's Exhibit "8" is a correct representation of the running board as I observed on the night of the accident, immediately after the accident, and the next time or a day or so later.

JOHN M. RYAN, called in behalf of the defendant, testified as follows:

I live at Hudson, Wisconsin, and am assistant master car builder of the Omaha Railroad and have been employed 20 years in its car department and all together have been employed by the Omaha Railroad about 35 years. I have under my supervision the construction and repairs of cars for the Omaha Railroad. The car shown on Defendant's Exhibit "9" is not the type car that would be constructed by the Omaha Railroad. They are constructed by regular [fol. 21] tank car builders and as a general rule are built by contracting concerns under specifications, and this would be a foreign car.

A car of that type runs from forty-five to fifty thousand pounds and the weight is distributed equally on each truck, one truck on each end of the car and each truck is intended to carry 50 per cent of the load. Each truck has four wheels and the northwesterly wheel of this car would carry approximately five tons. The wheel is constructed with what we call a tread and a flange. The flange extends downward on the inside of the rail to guide it and make the wheel follow the rail and to prevent the truck from leaving the rail. The tread is the portion of the wheel extending from the flange out over the rail, on which it rests. The flange is on the inside of the ball of the rail and the tread rests on the ball of the rail itself and as the car moves along a part of the tread extends on the outside of the rail. Referring to Defendant's Exhibits "8" and "9," the brake of that tank car is located to the left of the center of the running board north and south. It would be approximately 20 inches left of the center, north and south, and the running board is approximately 9 feet long. The brake staff would be approximately 32 inches from the north edge of the running board. The running board is approximately 11 inches wide and 1¾ inches thick. The pawl of this brake was located to the left of the brake and backward, as you face the car. The ratchet is attached to the brake staff by a square fit on the surface of the running board. I cannot tell from this picture how far the dog or pawl would be from the rear end of the plank. The brake staff would be located approximately in the center of the running board east and west and the dog or pawl would be approximately 2½ inches from the inside edge of the running board and

about 8 or 8½ inches from the outside or west edge of the running board. Safety appliances such as running boards and handholds are applied in the manner directed by the Interstate Commerce Commission and that Commission has issued an order which provides for the dimensions and the location and size of all safety appliances, that is, they designate or set the minimum that you must comply with. Defendant's Exhibit "12" is a pamphlet issued and printed by the Interstate Commerce Commission containing all of the safety appliance acts and all of the orders of the Interstate Commerce Commission relating to the size, dimensions, locations and the manner of the application of safety appliances under the safety appliance acts.

"Mr. Newcome: I will offer Defendant's Exhibit "12" in evidence.

Mr. Davis: No objection.

[fol. 22] The Court: It may be received."

Under the order of the Commission, the Commission has provided the size, method, type, location and the method of application of safety appliances for different types of cars. Under that order this particular tank car involved in this accident is designated on page 43 of the exhibit as "Tank Cars without End Sills" and the regulations with respect to this type of car are carried forward to pages 44, 45 and 46 of the exhibit. Under the order of the Commission as contained in Defendant's Exhibit "12" the end running board is required to have a minimum width of six inches and the side running board a minimum width of ten inches, and the running board is required to be continuous around sides and ends of the tank. While the minimum width of the Commission for this end running board is six inches, actually this running board had a width of 11 inches and was in excess of the minimum. Under the Commission's order the end handhold must be located on the running board, on the sides and ends. On the end, it cannot be more than 16 inches from the outer end of the end running board. There is no requirement in the order as to the distance that the bolts shall be in from the west edge of the car. The distance between the west edge of the running board and the inside edge of the handhold shall not be less than 2 inches, preferably 2½ inches. On this particular car the distance between the west edge of the run-

ning board and the inside edge of the handhold was aproximately 2¾ inches. The minimum dimension in diameter of the iron part of the handhold that extends out from the end of the running board is ⅝ inches. The handhold is attached to the running board by means of bolts, each having a minimum dimension of ½ inch.

They are applied down through the running board, they bore a hole down through the running board with a wood boring machine. This bolt, with the head part up, passing through the running board. The grabiron is then fastened by slipping up on to this bolt and then the nut is screwed on the bottom and drawn up tight, forcing the bolt firmly down into the wood. The bolt is ½ inch in diameter and while the bolts are given no special length, they are to be cut to suit the application and sufficient to clamp the fixture which you are applying. The order of the Commission prescribes n dimension as to the thickness of the running board. In order to have 2 or 2½ inch clearance outside of the running board, it is the usual procedure to set the bolt back so as to give you the desired clearance. In this particular case to get the desired clearance the bolt could have gone back a quarter of an inch or a trifling matter farther, but not to exceed that. The distance from the surface of [fol. 23] the running board to the safety railing around the tank of this car was approximately 45 to 50 inches. The Commission's order with respect to this particular type of tank car provides that the safety railing shall be located within a distance of 30 to 60 inches above the platform. In that way you have a variation of 30 inches in the location of it.

On this particular tank car there was also a similar handhold located at the southwest corner of the running board which is shown on Defendant's Exhibit "9." One handhold is required at each corner of the car. The brake is always located to the left of the center of the running board but the ratchet and dog or pawl are not required to be located on any particular side of the brake staff, that is, it may be in back or at the side or in front or on the right side. Where the dog shall be located is usually determined by the construction of the car or the location of the brake staff. You may find the pawl on either side of the brake staff, either front, rear or either side, and there are many cars constructed so that you could not put it back to the left or rear of the brake staff without interfering with the

end posts and other fixtures on the ends of the cars. That would not be true of a tank car of the kind in question. On a car of this type the pawl might be to the rear or front or on either side.

In setting a brake, the wheel is turned from right to left. This is necessary on account of the ratchet wheel, which has the teeth pointing toward the back, that the dog or pawl engage it so that when they turn it around the dog will drop in and it won't lash back. With every turn the dog is kicked into the notch and that holds the brake staff in that position and the tighter it is wound, the tighter you are drawing the brake shoes to the wheel through the leverage and connecting rods under the car. The action of winding the chain around the brake staff presses the brake shoe against the tread of the wheel. In releasing a brake the construction of the ratchet wheel is such that you have to take up a little slack and then you can kick the pawl out and then your wheel will readily unwind.

The handhold at the end of the platform shown on Plaintiff's Exhibit "8" was put there for the security of trainmen in coupling and uncoupling cars. It is put there to have something to grab hold of as they reach in to manipulate the various parts, such as cutting off the air, turning the angle cock, stooping down for to get hold of the air hose to break the coupling, or to adjust draw bars for the proper side motion they sometimes have to push the draw bar over a little; they get in there and open a knuckle and [fol 24] they always have something that they can grab hold of as security.

"Q. Is the handhold used for any other purpose but to grab with the man's hand?

Mr. Davis: Just a moment. Do not answer the question until the question is asked so that I can object to it.

Mr. Newcome: He has not attempted to.

Mr. Davis: Well, I am asking him not to answer the question until I can make an objection. I did not mean to interrupt your question.

The Court: Is there an objection?

Mr. Davis: When I asked him to kindly refrain from answering the question until I could make an objection, the question was not completed.

Mr. Newcome: Well, I will have to have it read.

(Previous question read by the reporter.)

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, leading and suggestive. I think, your Honor, it is extremely leading and suggestive, and not a proper question for expert testimony, and it is immaterial, I think, under the law, starting with a case that was tried, Nelson or Trauber vs. Dickens, and going down, it was held that that is an immaterial question in these cases. If this man, in doing his work came in contact with this grabiron and it gave way while he was setting or releasing the brake, liability follows. There is the same principle here as in the Trauber vs. Dickens case, where a man was trying to brake a car going down the track, uncoupling cars. There are many cases showing that, and if that is true, that is the law, then, and this question becomes immaterial in this case.

The Court: Well, if, as a matter of fact, the safety appliance was defective, and that defect was the proximate cause of the injury, I apprehend that that would be true, but if it was used for the purpose for which it was not constructed—even if it was sound and was used for a purpose that it would not be intended for, and by reason of that use, which was beyond its capacity, it gave way, I apprehend the law is that that would be a defense.

Mr. Newcome: That is our point exactly.

Mr. Davis: The point that I am making is that there is no dispute but what this grabiron was pulled out of that grabiron. That is an admitted fact in the case; it is undisputed. Now, that is a legal proposition, and the court knows, and counsel knows that that grabiron was pulled out by the use of it that is shown in this case, by putting his foot on the grabiron, and if that board was not rotten, it would not have pulled out.

[fol. 25] The Court: Well, you are asking me here to make a ruling on a question of evidence. That is, if it was sound and was put to an excessive use that it could not bear, but if it was pulled out for the reason that it was not sound, and it pulled out, that would be a different thing, but they are contending, as I understand it—the contention that, that they are making is that the board was sound and was properly constructed, and that it was not defective for the purpose for which it was used, and was not defective at all. You are contending that the board was defective, but I cannot decide that question that way.

Mr. Davis: Well, we will state it again, perhaps at the close, to the jury.

The Court: That is a question to be decided by the jury.

Mr. Davis: All right.

Mr. Newcome: Will you read the question, please, Mr. Reporter?

(Previous question read by the reporter.)

A. No, sir."

The handhold or iron bar attached to the end of the platform of a tank car in the order of the Interstate Commerce Commission, Defendant's Exhibit "12," is designated under "End Handholds." The other designations for iron safety appliances on cars under the Commission's order are ladder treads, sill steps and under the Commission's order the appliance we are referring to is designated merely as "handholds." There is one of these handholds at the opposite end of the car where there is no brake and there is also one of these handholds at the brake end but on the opposite side from the brake. It would not be possible for a man operating the brake from the right-hand side, as you face the car, to reach the handhold on the right-hand side of the platform with his foot. There is a provision in the order of the Interstate Commerce Commission with reference to handholds being attached to the running board. In the order of the Commission under the heading "Brake" they set out where the brake shall be and, then, under the heading "Ladders" they set out how many rungs there shall be in the ladder and where they shall be placed, and under the heading or designation "Sill Steps" they set out where and in what manner the sill steps shall be applied, and under the heading "Running Boards" they provide for the running board.

"Q. Is there anything under the heading 'Running Board' about the running board being of such strength or width or size, so that a handhold can be attached to it?

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial. It seems to me, no matter what ruling the Commission makes, we come right up against the [fol. 26] law, that they shall be secure. Supposing the Commission said that they shall be one-eighth of an inch thick, and they apply that rule, and they break, liability would

follow as a matter of law. They cannot hide behind the ruling of the Commission in any way. The law is that it must be secure. So it is clearly immaterial as to whether the Commission does or does not require them to be of a certain size or strength. They cannot defend in this case by simply saying, 'We have done all that the Commission said, so we are not liable.'

Mr. Newcome: If your Honor please, I might as well explain my point, so that it will be clear as the evidence comes in.

We contend that the running board provision of the Safety Appliance Act, and under the Safety Appliance Act of 1911, congress vested in the Commission the exclusive power to provide the type, dimensions and locations of all safety appliances. It has been held that where a carrier complies with the Commission's order, setting up a certain standard, that that is a compliance with the Safety Appliance Act.

Now, a running board, under the provisions of the Safety Appliance Act, is to be used as a running board, as a safe place to stand on and walk on, and there is no provision that it shall also be a safe place to attach a grabiron to. If this man was not injured by falling from that running board or stumbling over an uneven place on the surface of the running board—in other words, if he was not injured by reason of the fact that this running board was not a safe place to stand on, he cannot, or could not, recover if the defective running board were considered alone. And, secondly, we contend that the grabiron or handhold, under the Safety Appliance Act is designated as a handhold, and that there are other designations for safety appliances that are intended to put your foot on, to bear your weight on, and to climb on. And this has not been designated as such an appliance, and is never used as such, and that the mere fact that the man exerted pressure on the grabiron, pulling out the running board, does not show that the running board is defective, and that that defect in the running board was the proximate cause of his injury. * * *

The Court: He can answer that question.

Mr. Davis: Exception.

A. There is no such provision."

The provision with reference to where the handhold shall be attached in the Commission's order is under the heading

"End Handholds." There are other handholds required by the order which are called side handholds. Under the order of the Commission the handholds in the end platform of a tank car may be applied extending outward or down- [fol. 27] ward and not to exceed 16 inches from the outer end of the running board. If a handhold is extended downward there is no way that a man could get his foot into it in releasing a brake. These handholds are extended in different positions, outward, downward and under the end platform. Defendant's Exhibits "13" to "25," inclusive, are pictures showing the manner in which handholds are attached on various tank cars. Some are pictures of the brake ends of tank cars and some of the opposite end, and these pictures show the different manner and position of the end grabirons on the various types of tank cars, and they illustrate how a handhold is variously applied in accordance with the order of the Interstate Commerce Commission at the end of a tank car. (Defendant's Exhibits "13" to "25," inclusive, received in evidence.) The type of tank car involved here is referred to as a tank car without an end sill. Whether it would be possible to affix the grabiron to anything else on a car without an end sill other than the running board and comply with the order of the Commission depends entirely on the construction of the car. The order says that the grabiron may be attached to the tank shell, or body, so located within 24 inches above the center line of coupler, but this provision only applies when the tank extends out to, not closer than the plane parallel with the inside face of knuckle and tank head. When the tank extends out that far there is no place to get a running board on there and consequently the running board is up above. In a car of that construction the handhold is put right on the end of the tank. In cars constructed with a platform with the running board located toward the lower portion of the tank, your tank head is back too far to accommodate such a grabiron or be a safety. Therefore, they provide in such instance that the grabiron be placed out on this running board.

Cross-examination by Mr. Davis to lay foundation for objection.

Swinson was working on a car without end sill, and this car was equipped with a running board.

"Q. And isn't it a fact, then, that the rule which I read to you from the Interstate Commerce Commission rule, the manner of application of fastening a grabiron or handhold on all cars, or tank cars without sills—being a car of the type and kind and make in question in this case—that the manner of application and the location is stated this way: 'Location. Horizontal: One (1) near each side on end of car on running board, not more than two (2) inches back from edge of running board projecting downward or outward, or on end of tank not more than 30 inches above center line of coupler.' And in 'Manner of Application. End [fol. 28] handholds shall be securely fastened with not less than one-half (½) inch bolts with nuts outside (when possible) and riveted over, or with not less than one-half (½) inch rivet.'

Mr. Davis: I pointed out that this car, he stated, has a running board.

Mr. Newcome: We admit that.

Mr. Davis: What they do on cars that have not a running board is highly immaterial in this case.

Mr. Newcome: It is material in this respect, if the court please, that Mr. Davis claims that that was put there for a certain purpose, and that this man was using it for that purpose. We want to show that they handle all kinds of tank cars, cars with running boards and cars without running boards; that on 90% of these cars this handhold, provided for by the act, is in behind where a man could not reach it with his foot. Therefore, there could not be any custom here. Only 10% of the cars have handholds that might possibly be reached by a man with his foot. That is the purpose of it.

The Court: Your testimony is aimed at the alleged custom as to the use of the board, or the handhold?

Mr. Newcome: Yes, and to show that this is the only use to which this handhold is to be put.

Mr. Davis: If the court please, it certainly cannot be proper evidence, in rebutting the testimony of, where this Interstate Commerce Commission Act required, in a car of the type in use at the time of the accident, as to how it shall be fastened, and the end handhold shall be either in a vertical or a horizontal position and, then, when testimony is introduced that when it is there, and fastened right into the running board, and he puts his foot on it, that that is

the customary and usual way, and it would not make any difference, as a legal proposition, whether it is customary and usual or not. If in fact, they use it that way, as a legal proposition, and it gives way by reason of the defective condition of the running board, liability would follow. So the introduction of that testimony here is clearly immaterial, and the testimony of the witness about a large number of cars not of the type in question, not of the kind in question has no probative value because there is no requirement of the Interstate Commerce Commission and it falls. It does not tend to prove anything except that when a handhold is hung down, of course, it is not customary for a man to put his foot on it. If the handhold is so placed that a man could not reach it, of course, it is not customary to use it in that way. It has no probative value, because it is not the kind or type of car in question here. Now, then, there may be only 10% of the cars on which the handhold can be reached by a man putting his foot on it, and 90% where they can- [fol. 29] not be reached in that way, but that could not possibly be evidence of anything in this case of a material nature.

Mr. Newcome: Now, let us take it this way, if the court please, if the Interstate Commerce Commission and congress, when they passed the Safety Appliance Act, intended that this type of handhold, or the handhold that they provided for in their order, to be used as a foot rest or a step, they would have so stated, to start with; they would have called it a step or a type of sill step, or a type of ladder. Consequently, because of the fact that they designated it as a handhold, for which purpose it was intended to be used, wouldn't it be necessary to be used for that purpose on every tank car? We intend to show in this case that this Safety Appliance Act was not passed for the purpose—that this handhold was not required by the act to be put there for the purpose of providing a foot rest for the men that used it. Therefore, the act was not passed for the benefit of the man using the appliance in that way—any more than if he was standing on top of a brake wheel, and the brake wheel was defective, and he uses this brake wheel to stand on, could it be said that he was using that brake for the purpose for which it was intended?

The Court: I think I will overrule the objection.

Mr. Davis: Exception."

Direct-examination continued.

By Mr. Newcome:

On Exhibit "13" the end handhold is attached downward on the end running board. On that type of a car a man standing on the platform with his hand ahold of the brake would not be able to place his foot on that handhold because there is an obstruction in this particular type of a car which is also a car without end sills. The plank platform on that car is the same as the car involved in this accident. In addition, the uncoupling lever is also fastened to the outer portion of the end running board in front of the handhold to such an extent that in order to get a foot on it you would have to reach around and come back under to get on to the handhold, which is impossible. The handhold on the car shown in this exhibit extends downward. The cars shown in Defendant's Exhibits "18" and "19" both are constructed without end sills and have the end running board and there are obstructions between a man's foot standing on the platform with his hands on the brake and the end handhold on the left-hand of the running board. That is true in both exhibits. Exhibit "19" does not show the brake end of the car but in Defendant's Exhibit "18" the location of the brake is the same as that involved in this action. In Defendant's Exhibit "22" the car shown is con-
[fol. 30] structed with side sills and end sills and the end grabiron is located on the face of the end sill and extending outward and it would be very difficult for a man with his hand on the brake to put his foot on it as the flange of the end sill extends outward above the end handhold to such an extent that it would be almost impossible to get a foot on to the handhold. Defendant's Exhibit "25" shows a tank car constructed without side or end sills but with side and end running boards, and the grabiron or handhold is located on the end running board, extending outward and downward and it would be a very difficult matter for a man standing with his left foot against the pawl of the brake, at the location shown in this picture, to reach down and brace himself on the handhold at the same time releasing the brake.

Defendant's Exhibit "16" shows a tank car constructed without end sill or side sills but with side and end running boards located higher up from the base or frame and the

handholds thereon are extending downward and the brake is located on the end of the tank shell. It would not be possible to place your foot on the handhold or on those handholds at the end of this car to operate the brake.

Cross-examination.

By Mr. Davis:

The grabiron which is fastened on the running board is called a handhold and a man going between the cars for the purpose of uncoupling the cars takes hold of it. When in proper condition it is securely fastened into the particular part of the car that it is put on to, and ordinarily the purpose of fastening it into either the running board or the side of the car is for the purpose of fastening it so solidly that it will stand any ordinary strain put on to it by a man putting his entire weight and strength on the handhold. I have never known of a case where we have had to pull cars to the repair track by fastening chains into the handholds. This handhold could not have been set in more than a quarter of an inch or a half an inch more than it was. I was not present when any of the photographs were taken and do not know where they were taken. On the side of box cars there is what is known as a ladder and they have what is called ladder treads and they are never called handholds. I have never heard these treads called handholds. In referring to side or end ladders, the order of the Interstate Commerce Commission specifically specifies which is a ladder and which is a handhold, and you cannot, in terms to make it known to anyone familiar with car construction, which is which, unless you use the right term which designates the side ladder or end ladder, as ladder treads, and [fol. 31] the grabirons as specified, as grabirons or handholds.

I have had 36 years' experience as a railroad man and I have never heard these ladder treads called handholds by men familiar with its construction and I have never heard a brakeman, switchman or conductor call the treads handholds. These treads are used for the purpose of a man taking hold as he climbs up the side of the ladder, that is, taking hold by his hands so as to have a handhold on those treads as he goes up and they are also used for the purpose of putting his feet on as he climbs up, but they are not of

the same dimensions, fastened in the same way nor made of the same material as the grabiron in this case. They may be of the same material and dimensions, but they are fastened in different ways on different cars. On the kind of a car here involved they have to be fastened into the running board but they are not a part of the running board. Under the Commission's order the stirrup on these tank cars are required to be fastened into the running board and it is fastened with the same kind of a bolt and fastened in the same kind of way, so far as being put into the running board is concerned, and the stirrup is fastened into the running board for the purpose of a man putting his weight and his feet on the stirrup. It is the purpose of railroad men to have a running board where the wood is not rotten or defective so that the weight of a man on the stirrup will not pull the stirrup out of the board. I have been an officer of the company for 20 years and have made a very expansive study of safety appliances. I never saw this particular car. I have charge at Mitchell of the car department forces. Exhibit "8" shows that the stirrup on the side of the end is fastened into precisely the same board as the grabiron but with an additional brace back of the center board. From an examination of Exhibit "8" it appears that the stirrup is also fastened to the center board which is metal. That is the usual manner of application. The south end of this particular grabiron would clear the ratchet and the dog. The bolt fastening the sill step would prevent this grabiron being placed any farther back in the running board because you would then have two bolt holes close together and it would weaken the timber. That is one reason why you could not put the handhold back in the running board two inches farther but there is nothing next to the dog or ratchet which would interfere with this grabiron being put in two inches.

The car shown on Defendant's Exhibit "18" comes under the same classification as the car here involved, but the grabiron hangs straight down in a vertical position and on [fol. 32] that kind of a car the man could not put his foot in the grabiron in operating that brake. The handholds shown on the cars in Exhibits "13" and "18" extend differently and are different shapes but they are bolted in the same manner. They present an entirely different picture as to their situation and location with reference to the run-

ning board because the one was downward instead of outward. On the car shown in Exhibit "20" the entire structure constitutes your running board and the supports and that car has a support that passes over the center board while in the car involved in the accident it was braced to the center board. The grabiron on Exhibit "20" is not fastened in the same manner as the grabiron in the car in question, that is, one is riveted and the other is bolted. Under the rules of the Interstate Commerce Commission as shown on page 44 of Defendant's Exhibit "12," in fastening sill steps to tank cars without end sills, the following is the method of application:

"Steps exceeding 18 inches in depth shall have an additional tread and be laterally braced. Sill steps shall be securely fastened with not less than one-half inch bolts with nuts outside (when possible) and riveted over, or with one-half inch rivets.

Q. All right. Now, reading also from the same rules as to handholds, end handholds, I quote: 'Dimensions. Minimum diameter ⅝ of an inch, wrought iron or steel.' 'Minimum clear length, 16 inches, preferably 24 inches.'

'A handhold 14 inches in length may be used where it is impossible to use one 16 inches in length.'

'Minimum clearance, 2, preferably 2½ inches.'

And then: 'Location. Horizontal: One near each side on each end of car on running board not more than 2 inches back from edge of running board projecting downward or outward, or on end of tank not more than 30 inches above center line of coupler.'

And I will ask you if these are not the provisions for the location and the place of location of grabirons similar to the grabiron in the car upon which Mr. Swinson was working, that is correct, isn't it?

A. In part, I will say, yes."

You have specified the regulations in part but you have not specified the difference of the locations. It does not require all of these on any one tank. You could not have the same grabiron in two different places. That is what I am trying to make clear. The Commission specifies the size of bolts which you shall use, the minimum size. The order read specifies the location on the running board and it may be either on the running board or end of the tank

and where it is placed on the running board, as on the car [fol. 33] here, it must be bolted into the running board and the head of the bolt is on top of the running board usually. The circumference of the head of the bolt is about 7/8 of an inch, or I mean diameter, and the head of the bolt would extend out beyond the diameter of the bolt itself a little more than 3/16 of an inch. The bolt head rests on top of the running board and the extended part of the head of the bolt rests on the surface of the running board and we don't have them so that the bolt hole is large enough to permit the head of the bolt to slip through.

Redirect examination.

By Mr. Newcome:

The tank car in question was not manufactured nor were the safety appliances put on by the Omaha Railway. One of the reasons why the legs of this handhold were not put back farther than they were is that it would interfere with the bolt or hole of the stirrup and another reason is because if it was put back farther you would not get sufficient clearance out from the side of the running board as required by the order of the Interstate Commerce Commission.

There is one provision of the order of the Interstate Commerce Commission which permits in some instances where the last tread of the ladder happens to be at a place where a handhold is required you may use that ladder tread for a handhold, but there is no provision in the order that permits the use of a handhold as a ladder.

Eugene Myers, called in behalf of the defendant, testified as follows:

I live at 356 North Cleveland avenue, St. Paul, Minnesota, and am general car foreman at Minnesota Transfer Railway and have been employed in its car department for 16 years. Minnesota Transfer Yard is a joint yard for nine railroads and we break up all trains that come into the yard and switch them into trains so that the cars of the nine railroads entering St. Paul and Minneapolis are broken up, made up and switched into Minnesota Transfer Yard.

We handle a great many tank cars, probably an average of 50 or 60 tank cars daily and we switch tank cars in connection with the oil pipe line entering the Twin Cities. I was present when the pictures shown in Defendant's Exhibits "13" to "25," inclusive, were taken. They were taken in one of our yards at Minnesota Transfer Railway and the cars shown in these pictures are types of cars commonly used today and in use during September, 1932. I am fa-
[fol. 34] miliar with the type of car shown on Defendant's Exhibit "9." From my experience as a car man and my observation of oil tank cars that pass through the yard at Minnesota Transfer Railway Company, there is a very small percentage of oil tank cars equipped with handholds extending out from the running board as shown on Defendant's Exhibit "9." It would run about 10%. At the request of Mr. Newcome I have kept a record of the cars entering the Minnesota Transfer Railway Company yard within a period of three weeks to determine what percentage of the cars were equipped with grabirons extending out from the running board as shown on Defendant's Exhibit "9" and my record shows that out of a total of 883 tank cars, only 87 were equipped with the grabiron extending out from the running board as shown on Defendant's Exhibit "9."

I am familiar with the purpose of that handhold at the end of the tank car. It is provided for by the Interstate Commerce Commission as a safety measure, known under the rules as a handhold for men going in between cars for any reason, to take hold of. Car inspectors use them for inspecting cars; when they look under the cars they take hold of the handhold and trainmen and switchmen use them when they go in between cars for any reason, to adjust a knuckle or break the air hose. In using the handhold as I have just described, the employe using it would be standing on the ground and would grasp it with his hand. It would be a safety measure in the event that the employe was in between the cars and they suddenly started. I have seen a large number of tank cars handled in our yards and have seen men letting off brakes on tank cars. At times I see them letting off brakes on moving cars, but it is not the general practice. In all my experience at the Transfer Yard I have never seen a man put his foot on that grabiron, using it in releasing the brake.

Cross-examination.

By Mr. Davis:

I am not a brakeman and my work is on the outside in the yard and also in the car shops. While I never have occasion to particularly observe men working on trains to see exactly where they put their foot, I cannot help but notice how they perform their work around the yard. I never watch particularly to see whether a man would put his foot on the handhold, but I have watched them ride cars to see how they ride them and how they handle their brake. I cannot recall in all my experience of having seen a man on a car just like this, of seeing a particular case of a man releasing a brake. That is, I have no independent recollection of any particular case. I did not say that all of the [fol. 35] cars entering the Twin Cities go through the transfer and, of course, a great many tank cars go through the Twin Cities but do not come through the Transfer.

George M. Welch, called in behalf of the defendant, testified as follows:

I live at Mankato, Minnesota, and am trainmaster for the Omaha Railroad and have been employed by it 22 years, 18 years in train service as conductor and brakeman and approximately four years as trainmaster. During my service as conductor and brakeman I have had occasion to handle a considerable volume of tank cars. I have handled all types, including this type of car shown on Defendant's Exhibit "8" and I notice that there is a handhold in the end of the platform in that tank car. It is a handhold and is used for the brakeman in going in between the cars, as an extra precaution so that they won't fall to the ground if the car happens to be moving while they are in there. Then, it is used by the brakeman or car repairer in reaching over and turning the angle cocks and by inspectors and brakemen in inspecting their train, they take hold of that as they look in under the cars. It is not used in releasing brakes on a tank car. In all my experience as a brakeman or trainmaster I have never seen a brakeman put his foot in a handhold of that type. On a car of the type in question, where the end platform is 11 inches wide, an inch and a

quarter thick and 9 ft. long and where the brake is located to the left of the center of the running board as you face the car at the brake end, with the dog or ratchet of the brake located three inches from the inside edge of the running board or eight inches from the outside edge and where there was a space of at least two ft., ten inches from the brake to the north end of the running board, in releasing a tight brake I would use my left foot to kick off the dog and my right foot would remain on the running board of the car and with a body swing toward the tank, or to my left. I would so pull the wheel so as to release the dog. If we assume that the space between the inside edge of the running board and the tank was from 14 to 15 inches and that the brake was tight and that I needed a leverage or brace for my foot, I would not put my foot out on the handhold because that would not give me more pressure or leverage because in the first place, that is approximately two inches lower than the running board and I would be out of line and because of the dimensions of the iron rod compos- [fol. 36] ing the handhold there would be too much chance of the foot slipping. It would not be necessary for me to put my foot out on the handhold in releasing a right brake.

The eight inch space on top of the running board out from the dog would be sufficient room for me to place my right foot so as to secure proper leverage or support.

I am familiar with the type of platform that is placed on box cars. It is on the end of the car. I was present when the five photographs marked for identification as Defendant's Exhibits "26," "27," "28," "31" and "32" were taken. Exhibit "27" is the picture of a box car with a brake and brake platform towards the end of the car. Exhibit "31" is a caboose showing the end platform with the brake on the left-hand corner and shows handholds on the sill of the caboose. Exhibit "28" shows the end of a coach and the draw bar, grabirons and a side view of the coach step and the brake is on the left-hand side of the draw bar and is not in view because it is on the inside of the platform. Exhibit "32" is a picture of a gondola car, showing the brake on the end of the car and the brake platform on the same end. (Exhibits "27," "31," "32" and "28" received in evidence.) From my observation as a brakeman, conductor and trainmaster, the method of letting off brakes on tank cars such as involved in this action at Mitchell or Sioux

Falls, S. D., is the same as that in vogue on every part of the railroad.

Cross-examination.

By Mr. Davis:

A brakeman should not have any trouble in placing his feet on a running board when releasing a brake on a tank car. If Mr. Swinson placed his foot on the handhold I would not say he did it as a matter of convenience because he should not have any trouble placing his feet on the running board. I have never seen it done.

JAMES J. MEALEY, called in behalf of the defendant, testified as follows:

I am terminal superintendent of the Omaha Railway and have worked for that company since 1899 and have been in railroad service since 1897. Two years as a freight brakeman, 18 years as a freight conductor and one year as a switchman. As terminal superintendent in the Twin Cities I am in the yards every day where men are riding cars and setting and releasing brakes on cars and that includes more than our own yard. I have had a great deal of experience [fol. 37] in setting brakes on tank cars and in switching tank cars. In all of my railroad experience I have had more or less experience in switching tank cars and for 3½ years I was up at Barksdale as conductor of a switch train where we handled possibly 50 tanks a day. I am familiar with a tank car with a running board and with a handhold attached to the end as shown on Defendant's Exhibit "8." The handhold at the end of the platform on a car of that type is used by car inspectors, brakemen, switchmen and other trainmen for the purpose of taking hold of when they uncouple the air hoses, turn the angle cocks, or when they lean down to inspect the car, and when doing work of the type I have described they would be standing with their feet on the ground. I have never seen it used as a place for a man to put his foot on. I have never seen it used by a switchman or brakeman or any other railroad employe as a ladder rung to put his foot on. I have never seen it used by a switchman or brakeman or any other employe of a railroad as a place for putting his foot on in obtaining

pressure in releasing a tight brake, nor have I ever seen any of these men use it as a place to rest his foot on in releasing a brake.

In releasing a tight brake on a running board of this type I would stand on either side of the brake on the platform and give my body a twist. Releasing a brake is mostly by the jerk of your body. On a running board of this type, assuming it to be 11 inches wide and that the dog set back eight inches from the outside edge of the running board and three inches from the inside edge and that there was a space of 14 or 15 inches between the inside edge of the running board and the tank, in my judgment, as a practical railroad man, it would not be necessary to place my foot on any other object than the running board. You would get less purchase by putting your foot on the handhold because, in the first place, your handhold would be a little lower than the platform and, then, too, a handhold would be more or less slippery and it would not give you very good footing. There are similar handholds at the other end of the tank on the running board and they are used for the same purpose that I have explained, for putting your hands on when you lean under the car to part a hose or examine the car. I would say from my observation and experience that the big majority of the handholds on tank cars would be where you could not use them to put your foot on.

In letting off a brake on a car you do not approach the brake end of the car from any particular side and if a brakeman or a switchman on the car in question happened to be on the south side of the car he would release the brake from the side he happened to be on and would not cross [fol. 38] over. In some cases I would say this would be true even if the dog happened to be on the north side of the brake staff. If the brake staff happened to be at the outside edge of the running board and the dog nearer to the outside edge, that would not make any difference in the way I would release the brakes, and assuming the dog and brake to be located at the outside edge of the platform, in releasing it I would not use this handhold as a brace for the foot.

Cross-examination.

By Mr. Davis:

In releasing a brake most of the power and pressure is made by a jerk of the body. The brake is released by the

movement of your body, but at the same time you are putting pressure on your foot in doing that. The pressure would not be equalized on both feet. I would say that the foot you are using to release the dog would have very little pressure on it. It might be true that you would be able to put enough pressure on a handhold by placing your foot on it in releasing the brake to tear it out of the running board even if the running board was a good board, solid and without any defects.

Redirect examination.

By Mr. Newcome:

If you placed your right foot down on the grabiron in releasing a tight brake there would be a quick pressure downward and outward.

CHARLES T. DEWITT, called in behalf of the defendant, testified as follows:

I live at St. Paul, Minnesota, am a switchman for the Northern Pacific Railroad and have been employed as a switchman by that railroad for 18 years. During that time I have occasion to handle tank cars and set and release brakes thereon. The handling of tank cars will vary from day to day. Sometimes we handle 10 and sometimes 20 and sometimes 2 or 3. I have handled all types of tank cars, that is, tank cars with side platforms, tank cars with running boards and tank cars with end sills and no running boards, and I have released and set brakes on a tank car of the type shown on Defendant's Exhibit "8." The handholds located at the end of the running board of that tank car are used for various things. Sometimes for disconnecting the air hose, sometimes for turning the angle cock, that is, to take hold of when you are doing this work. The air hose runs in a diagonal position underneath the car and [fol. 39] you would stoop down to get hold of the hose and draw it up and by taking hold of this handhold with your other hand, it would give you a steady position and always protect you from slipping or falling. The car inspector has to use it for looking underneath the car or for various other reasons in inspecting the car, and it is used as a grabiron

if a carman, switchman or brakeman should be between the cars and it should suddenly start to move, it would be a very good thing for him to hold on to. In all my experience I have never seen a man use it to stand on or to brace his foot on nor have I seen a man in releasing a brake put his right foot on it to brace himself. On the tank car in question if the brake were set tight, good and tight, and I tried to leave it off, I would put my body toward the tank car, toward the end of the car and I would then push on the brake, kick it off with my left foot. You could secure sufficient purchase or brace on the running board to let the brake off. You have more pressure on the running board because you have more foot surface. Your feet are on the running board flat. If you put your foot on the handhold or safety iron you have a very small space on this iron because it is about 5/8 of an inch in diameter and if you put your foot on there you would have to balance it in the center and if you did not do that you would slip either one way or the other.

ARTHUR J. MCCANN, called in behalf of the defendant, testified as follows:

I am a switchman for the Omaha Railroad and have been employed by it for 20 years. I started as call boy in 1913 and worked two years and went braking and broke three years and I have been switching since then. During the time I have been a brakeman and switchman I have had occasion to handle and release and set brakes on tank cars. My work as switchman is practically all done in what is known as a hump or hill yard at East St. Paul, where the brakes must be set tighter than in a flat yard and where we ride all the cars. After the car is cut off at the top of the hill we ride the car and manipulate the brake until it stops. I have handled and am familiar with the type of tank car shown in Defendant's Exhibit "8" and have released brakes on cars of that type. The handhold at the end of the running board on each side of these tank cars is a safety iron, a safety grabiron, that is what we call it in the yard. They are used for breaking the air hose and turning the angle cock, to get a leverage, and for inspecting, if you are inspecting a train, to get hold of and look underneath. [fol. 40] During my 20 years of experience I have never

seen them used for any other purpose and I have never seen an employe or switchman or brakeman stand on a grabiron, nor have I ever observed a brakeman, nor have I myself ever stood or placed my foot in the handhold for the purpose of releasing the brake. In releasing a brake on a car of this type I would put my back towards the tank and pull on the brake and it will give and as soon as you release the dog it will jump. Sometimes if you are not on the alert the brake will sometimes throw you when you release the dog. In releasing the brake I would put my foot on the platform. I have never placed my foot on the handhold in releasing the brake. I never tried to get more leverage and pressure by placing my right foot on the grabiron but I would not imagine that you would get any more leverage or pressure in that way than by leaving your foot on the platform.

Cross-examination.

By Mr. Davis:

In the hill yards we have brake clubs and we put those into the brakes to tighten them up and to get greater purchase than if you used your hands and where a brake is set with a brake club it is necessary to use a brake club to release it.

Redirect examination.

By Mr. Newcome:

I have released brakes without a brake club and have never had occasion to put my foot on the handhold.

SAMUEL J. DUNLAP, called in behalf of the defendant, testified as follows:

I have been employed by the Omaha Railroad as a switchman for 20 years and during that period have had occasion to set and release brakes on tank cars, including the type shown in Defendant's Exhibit "8." The handholds shown at the end of the running board are put there to take hold with your hand while you are breaking the air hose and to look over the running gear of the car and probably turn an angle cock. It is just a precaution in case the car should

move. I have never seen the handhold used as a place to put your foot to brace it and have never seen a man stand on the handhold. I have never observed anyone else put their foot on the handhold to brace themselves in releasing the brake nor have I done so. I would keep my feet on the platform in releasing the brake. If I was unable to release the brake with my feet on the platform I would wait until [fol. 41] the car stops, because as I understand it here, the car had only 30 feet more to go.

JULIUS WILLIAM JOHNSON, called in behalf of the defendant, testified as follows:

I am yardmaster for the Milwaukee Railroad and have been employed by it 32 years, 6 years as a brakeman, 3 years as a conductor, 6 years as a switchman and 17 years as a yardmaster and in those occupations I have handled tank cars up in the thousands. I have had occasion to release and set brakes on moving tank cars and have released and set brakes on a tank car of the type shown in Defendant's Exhibit "8." In releasing a tight brake on a tank car of this type I would place my feet on the platform. That would be true no matter where the dog or pawl was located. You would not get any more purchase by placing one foot on the handhold, because the handholds are below the platform and your handhold is a dangerous place to put your foot on. I have never seen a switchman or a brakeman use this handhold to stand on or place his foot on to get leverage or as a brace. It is to take hold of for safety in case you go between the cars. Car inspectors use them, hang onto them when they are looking under the cars, and they use them in breaking the air hose.

Cross-examination.

By Mr. Davis:

The handhold is not a delicate mechanism and if it was fastened into the running board and a man put his weight with his foot on it I would not expect it to break off right through the wood.

ARTHUR NELSON, called in behalf of the defendant, testified as follows:

I am a switchman for the Great Northern and have been employed by it for 18 years. In working in the yards in Minneapolis in the past three years I have handled possibly three or four hundred tank cars and have had occasion to release brakes on tank cars of the type shown in Defendant's Exhibit "8." The handhold or grabiron on each end of the running board is for the purpose of getting hold of when you are breaking the air hose or looking over the train, in stooping in under it, and at the same time holding your body in balance, to keep from falling down, or in case the cars should be moved. It is used by the car inspector [fol. 42] to look it over for the same purpose. I have had occasion to release and set brakes on a platform brake on the end of a freight car such as is shown in Defendant's Exhibit "27" and also on a gondola car such as is shown on Defendant's Exhibit "32." The platform on a gondola or a box car shown in these exhibits has less room than on a tank car and I have released tight brakes on platforms of that type. There are no grabirons or handholds attached to the platform of a gondola or a box car and in my 18 years of experience as a switchman I have never used a handhold as a brace for my foot in releasing the brake.

EDWARD B. STANLEY, called in behalf of the defendant, testified as follows:

I am a switchman and yardmaster for the Milwaukee Road and have been employed by it 33 years, 10 years as a brakeman, 3 years as a switchman and 20 years as yardmaster. As brakeman I worked between Minneapolis and Austin, Austin and Calmar, Austin and Mason City, Farmington and Mankato and as switchman and yardmaster all the time in the Minneapolis yard. I have handled thousands of tank cars and have released and set brakes on tank cars. There is no difference in the method of releasing and setting brakes at Calmar, Iowa, and Austin, Minnesota, and at Minneapolis. I have released and set brakes on tank cars of the type shown on Defendant's Exhibit "8," and in doing so have never put my foot on the handholds at the end of the running board to secure a base so that I could

exert pressure, nor in releasing the brake, during my experience, I never have placed my foot on the handhold. The handhold is used by car inspectors. They will take hold of it and look down underneath the car or you can take hold of it and reach down and break the air hose. In cold weather when the angle cocks are stiff you can take hold of them and get a better pressure. I have never seen these handholds used except to grab with your hand or hands. In letting off the brakes on tank cars, you approach from either side and if in connection with the tank car in question, I approach from the south side I would not necessarily swing over to the north side to release the brake. Quite frequently you release a brake from the opposite side of the brake staff from which the dog is located. If I was releasing a brake from the south side when the dog was on the north side, I would not be able to reach with my foot the handhold on the south side.

[fol. 43] RAY J. VANBAUM, called in behalf of the defendant, testified as follows:

I am a switchman for the Great Northern and have been employed by it 15 years and before that I was employed for about seven years as a brakeman. The method of releasing brakes is the same in every part of the country, and I released brakes the same when I was a brakeman as I did when I was a switchman. I have let off brakes on tank cars of the type shown in Defendant's Exhibit "8." The handhold at the end of the running board is a safety grabiron used mostly by the men standing on the ground or walking in between cars to balance themselves when they stoop down to couple the air hose or turn the angle cock or look under the car for any reason. I have never used it as a brace for my foot in releasing a brake. I place my foot on the running board when releasing a brake.

CHARLES H. WILCOX, called in behalf of the defendant, testified as follows:

I am employed as a brakeman and conductor on the Omaha Railway and have been so employed 20 years. I

have had quite a little experience in setting and releasing brakes on tank cars. The method of doing this work is the same all over the country. In releasing a brake on a tank car, if I get on at the left side, facing the car, I would walk over to the brake, take hold of it and swing my body towards the tank of the car, kick the dog or pawl off with my left foot. If I happen to be on the right side I would try first right from where I was taking hold of the hand brake with my hands and try to kick the pawl off with my left foot, and if it was too tight, then I would swing around a little and proceed about the same as I have just stated. I have released brakes from either side. The fact that the dog or pawl happens to be on the opposite side from which you approach it does not prevent you from releasing the brake while standing on the approach side. I have released platform brakes on box and gondola cars. There is less room on the platform of these cars than on the running board of a tank car and there is no grabiron or handhold attached to a box car platform or a gondola platform upon which you you could rest your foot.

In all my experience I have never placed my foot on the handhold at the end of a tank car nor have I ever seen any other brakeman, switchman or railroad employee do so. If I were riding a tank car such as is shown in Defendant's Exhibit "8" and moving at a speed of from two to four miles an hour, approaching another tank car about 30 feet [fol. 44] distant, to which it was intended to couple and stop and if I found the brake tight and could not release it the first time I would take the south position on the running board of that car and have both feet on the running board and give it a little swing just about the time the car coupled on the other one. That would have the tendency to move the brake a least bit and I might get the slack then to kick the brake off. If I could not do it then I would have to get someone to help me kick the brake off. Putting my foot on the grabiron would give me less leverage to kick off the brake.

HARRY B. HANSON, called in behalf of the defendant, testified as follows:

I am a brakeman and conductor on the Omaha Railroad and have been employed by it as such for 23 years and dur-

ing that time have had experience in releasing and setting brakes on tank cars, including cars of the type shown in Defendant's Exhibit "8." The handholds at the end of the running board are used as safety irons for the car inspectors looking over the train and for brakeman looking over the train, uncoupling the air hose, turning the angle cocks. I have never seen them used for a man to stand on and in my experience as a brakeman and conductor I have never placed my foot and braced it on the handhold in releasing the brake. In releasing a brake I would have both feet on the platform. In releasing a tight brake you would get less leverage by putting your foot on the handhold because you use a body swing in letting off the brake and with your foot on the handhold you would be off balance and you could not swing. You would be less secure with your right foot on the handhold because the iron is liable to be slippery in cold weather, frosted or wet.

JOHN R. GILCHRIST, called in behalf of the defendant, testified as follows:

I am assistant general yardmaster at Minnesota Transfer Railway, in charge of the night yard and have been employed by it 20 years, 5 years as switchman and 15 years as yardmaster. All types of cars are handled in the Minnesota Transfer Yard, flat cars, box cars, gondolas and tank cars. We have on hand from 100 to 200 tank cars all the time and I am familiar with all of the different varieties of tank cars and how the running boards and handholds [fol. 45] are applied. I have had occasion to set and release brakes on tank cars of the type shown on Defendant's Exhibit "8." A great many of that type are ridden and the brakes set on them. We have a hump yard and it is necessary to ride the cars and set the brakes on them in classifying the same.

In all my experience as a switchman and yardmaster I have never seen any employe of the railroad place his foot on the handhold to brace it or stand on in releasing a brake. They stand on the platform, either on the right side of the brake or on the left side, whichever side the man happens to be, to get on that side of the car. The handhold at the end of the end platform of a tank car is a safety appliance

for the car men, switchmen and brakeman, in fact, it is there only as a precaution for safety, to grab on to. When a man steps in between the cars he puts his hand on there to break the air hose; each car has an air hose on the end and they are coupled together. He steps in there and puts one hand on the grabiron in case the car should move. There are types of cars where the handhold is so attached to the end of the car that you could not get your foot on it while releasing the brakes.

Cross-examination.

By Mr. Davis:

Minnesota Transfer Railway is under the joint ownership of nine railroads, one of which is the Omaha. Grabirons are not delicate mechanisms and are fastened to the running board quite securely. I have never seen any pressure put on them outside of the men grabbing hold of them to balance themselves. If a man happened to be on the ground and he wanted to pull himself up he would naturally take hold of it. That would be his only direction to pull himself. I have seen a man take hold of a grabiron to pull himself across the drawbar and he would put his weight on the grabiron to pull himself over. I have never seen one of these grabirons pull out.

J. Harold Remick, called in behalf of the defendant, testified as follows:

I live at St. Paul, Minnesota, and am general car inspector for the Northern Pacific Railroad and have been employed in its car department over 30 years and in connection with my work during that period have had experience in the repair, observation and handling of oil tank cars and am familiar with the construction, particularly with reference to the brake end, running board and handholds on the type of car shown in Defendant's Exhibit "9." I am also familiar with the platform and the construction of the end [fol. 46] platform and the application of the handholds on that type of platform of the same car shown in Defendant's Exhibit "8." At the left-hand side of the end of the running board there is a handhold attached. These handholds are attached at various locations on different cars. The

handhold on this type of running board does not always extend outward, but also extends downward. The Interstate Commerce Commission requirements provide that this type of handhold shall not extend back farther than two inches from the outside edge of the running board in order that it be made available for men to grab readily. The handhold at the end of the running board is put there for the safety of switchmen and trainmen when they have to go between cars to couple, uncouple or line up couplers, principally. Switchmen use them and also trainmen to take hold of with their hands.

In using this handhold in connection with uncoupling cars, parting the air hose and examining the rigging under cars and between cars, a man would grasp it with his hand and I have never seen this handhold used in any other manner by trainmen. In a movement of a car of oil from the oil fields to destination in the northern part of the country it is customary to make an inspection of the car at each terminal, that is, at any division point where car men are employed for that purpose and that inspection includes the condition of the handholds and their manner of being fastened. The purpose of the inspection made by the delivering and the receiving roads is to see that there are no defects for which the delivering line is responsible.

The handholds on the running board shown in Defendant's Exhibits "8" and "9" meet the requirements for end handholds and in the first place are applied by the builder of the car, which, in all likelihood, was a car building concern. The receiving railroad would have no right to refuse a car with handholds on of that type.

Cross-examination.

By Mr. Davis:

A car received by our line from another line would be generally inspected on its arrival in our yard to see that it is in safe condition for further use and that duty is just the same as if it was our own car and is a continuing duty.

[fol. 47] G. J. CONKLIN, called on behalf of defendant, testified as follows:

I live at Minneapolis, Minnesota, and am foreman of car inspectors for the Soo Line Railroad, have been employed

in its car department for 18 years and have been employed in car work all together since June 1, 1901. I supervise the inspection of cars and am generally familiar with all types of oil tank cars and the safety appliances on them. I am familiar with, and have had experience in the handling or repairing oil tank cars of the type shown in Defendant's exhibits "8" and "9." The handholds at the end of the running board on these tank cars are for trainmen, switchmen and others who have to do with the uncoupling and oncoupling of cars to take hold of to protect themselves while they are between the cars.

Running boards at the end of tank cars become weather beaten and stained with water and water frequently seeps into the bolt holes beside the bolts. That might indicate that the timber is not firm and secure. Because the timber is discolored I would not say that that would indicate that the timber is not sound.

Cross-examination.

By Mr. Davis:

I have never worked as a brakeman or a switchman.

Plaintiff's Rebuttal

Blanche D. Swinson, called in behalf of the plaintiff, testified as follows:

Plaintiff's Exhibits "R," "S," "T," "U," "V" and "M" and "N" are photographs taken by me of the draw bar or the running board in question on September 18, in the afternoon, and they show substantially the position and the condition of the grabiron and the running board at the time the pictures were taken. At that time I saw the running board and the grabiron and the wood in the running board appeared to be old wood. That is what I would call it as I saw it, and it was very dark. (Exhibits "R," "T," "S," "U," "V," "M" and "N" received in evidence.)

[fol. 48] Walter Irwin, called in behalf of the plaintiff, testified as follows:

I am employed as a switchman by the Soo Line Railroad and have worked for the Soo Line since 1920. I also

worked as a switchman for the Great Northern and have switched from 1917 up to date, and I am 33 years of age. In my work as a switchman I have had experience in setting and releasing brakes on oil tank cars. I have had occasion to work on tank cars without end sills, similar to the car shown in Defendant's Exhibit "8" and am familiar with the grabirons attached to the ends of these cars. These grabirons sometimes extend down vertically and at other times out horizontally. I have had occasion to switch and set brakes and release brakes on tank cars of this kind and type. I have seen hundreds, I believe, in my experience of cars similar to the car in question, where the handhold would be out horizontally. I have used this grabiron or foot step and it is customarily used to grab hold of one car and grab the other car—swing yourself up on the draw bar and get over to the car; it is customarily used to step on and step over to the other car, because of the distance between the cars. It is customarily used to put your right foot on when you are letting off a brake that is set rather tightly. Your left foot is put into position to operate the dog that catches the ratchet on the brake staff. I have seen other railroad men use this horizontal grabiron in releasing brakes. In my work as a railroad man I have had occasion to spot oil tank cars at various industry tracks, both for the Great Northern and the Soo Line Railroad and at the time that I worked for the Great Northern the Minnesota Transfer was the interchange for all cars, including tank cars, and during that time I had occasion to set and release brakes in the Minnesota Transfer Yards on oil tank cars similar to the car in question. The position of a brake of that nature will not allow you to get around behind the brake because of the closeness of the top of the wheel to the tank. It all depends upon the position of the dog that operates on the ratchet of the brake staff, but at no time have I ever seen a dog operating on a ratchet holding the brake staff on the right side. Therefore, it makes it necessary for a man to get to the left side and, therefore, it all depends upon the tightness of the brake, and you put your right foot on this sill step or grabiron and your left foot operating the dog.

If the grabiron went down vertically I would not use the handhold to put my foot on. The position of the dog on that type of brake is different, it sets back more. If the

handhold or grabiron had been down vertically it gives you a position to put your right foot over more on the right side of the platform because of the position of the dog be- [fol. 49] ing around more in the center, giving you a better chance to operate the brake. With the dog in this position and no horizontal grabiron but a vertical one, I could not put my foot on the vertical grabiron. If on a car with a running board the same size as that on the car in question and the grabiron extending vertically down, if I had a tight brake I have got to let off and if I am unable to do so I would ask for help. I am still subject to call by the Soo Line.

Cross-examination.

By Mr. Newcome:

If there was a horizontal grabiron I would use it only in case of a tight brake and if the brake was not tight I would release it with both feet on the platform. Where I would put my foot on the grabiron to release the tight brake, I would do that for the purpose of getting leverage so as to be able to exert that pressure on the wheel. In doing this your weight is about the same on both feet. There might be a little more weight on your right foot when you kick the dog out, but you would have considerable weight on your left foot. I have never had my foot slip off of the grabiron in winter time. This grabiron kind of serves as a pocket for the foot. I should judge that the open space between the inside edge of the grabiron and the outside edge of the running board is about 2½ inches and in order to get your foot down on the grabiron you have got to get it over the edge of the running board first. You can slide your foot in there and it will hold securely. I did not say my foot would be straight down. I said you could slide your foot in there so it would stay securely. These grabirons vary from 2½ inches to, I should judge, about 3 or four inches.

"Q. Do you mean to tell this jury that if you came along on the left-hand side of the car in the night time, to set this brake or release it, and you found the brake tight, that you would then go over and look to see what kind of a grabiron was there, as to whether it was sticking straight out hori-

zontally, or down on an angle, or underneath the running board?

A. My position would be to look for the brake, to let the brake off, and if the appliance was there to put my foot on in letting off the brake, I would use it.

Q. And would you first go over to the edge of the running board, to see whether it was a grabiron that stuck straight out, or stuck slanting down, or underneath the running board?

A. You don't have to go around, underneath, and around the car to locate it. This here grabiron is almost even with the platform of the car.

[fol. 50] Q. What if you had the brake located on the platform in the identical position as shown in Exhibit "8," and the grabiron extended down, what would you do?

A. Well, I would not use anything that was not there, that is only common sense.

Q. How would you let the brake off?

A. How would I let the brake off?

Q. Yes.

A. Well, I would do the best I could to let the brake off and if I were unable to I would ask for help.

Q. Then, it is only in these cases, as I understand you, where you find a tight brake, and you are not able to get it off with your feet on the running board, and on a car where you would find one of these grabirons sticking out, that you would use it?

A. It is a common occurrence to use this as a step.

Q. I am asking you what would you do?

A. Will you repeat the question, please?

(Previous question read by the reporter.)

A. Well, I answered your question, it is a common occurrence.

Q. No, I am asking you what you would do, the question says, whether it would be only in these cases where you found the conditions that I mentioned, when you would use this grabiron?

A. Why, if the appliance was there, I would use it.

Q. But not unless the brake was tight and you could not get it off with both feet on the platform?

A. It depends upon the condition of the brake, that would have something to do with it, yes.

Q. Now, it appears in the evidence that only 10% of the tank cars are equipped with grabirons of this type, so that being true, there would be only 10% of the cars on which you could find such a grabiron?

A. You are speaking of today, are you?

Q. Yes, I am speaking of today, in September of 1932.

A. Well, you must consider that from 1917 up to 1932 there have been lots of improvements in the cars.

Q. Yes; but I am speaking of September, 1932. If you were working at that time, there would only be 10% of the cars on which you could possibly find grabirons like this (indicating) where you could put your foot on?

A. Well, in my position they all go down, up to—before now.

A. If I found a car in 1932 that had that appliance on it, I would use it in letting off the brake.

[fol. 51] Q. Only when the brake was tight, and you could not let it off by standing on the platform?

A. Well, if the appliance was there on the car, I would use it, if the brake was tight."

It all depends upon the position of the dog or pawl. The position of the pawl on this car would require you to get slightly more to the left than on a car that had the pawl slightly more to the right.

"Q. Well, aren't all the pawls on the left?

A. All pawls are on the left."

If the pawl was slightly more to the left I would have to put the position of my feet, both feet, slightly more to the left. On the car in question its location is more to the left and you would have to put your left foot more to the left and, then, that would almost put your body straight across with the running board and would require you to be standing on the running board and to put your foot on the sill step or grabiron. The dog on this car, as I told you, is slightly more to the left than the 90% of the cars today. This one on Defendant's Exhibit "23" is not quite around as far, in my opinion. I am assuming that there is a space between the inside edge of the running board and the tank but not enough to allow a man's body back there. If the space was 14 or 15 inches I could not get back there.

If the brake staff was out at the outside edge of the end running board it would not be necessary for me to use a

handhold in that case, because it would put you directly more in position with the brake and would not require you to get some more to the left. I have not seen a pawl right at the outside edge of the running board but if the dog was out farther it would require you to get more to the right and under those circumstances I would not have to use the handholds. I have released and set brakes on box cars, that is, platform brakes on box cars and the width of the platform is 4 inches and its length 24 inches. I could stand on the platform and release the brake on this kind of a car.

"Q. And yet on an 11 inch running board you won't find room enough to stand on it and release a brake?
A. (Witness hesitating.) I did not say that you would not find room on the running board to release the brake."

There are also grabirons on this car with a platform brake on which you could put your left foot on if you so desired. The reason I wouldn't stand on the running board to release a tight brake on the type of car involved in this accident is because the position of the dog would make me get slightly more to the left, and put my right foot on the grabiron, to allow me more leverage in letting off a tight brake. The position of the dog is the only [fol. 52] reason. On cars that have the grabiron extending down, in my opinion, the dog is situated farther back so that it will enable you more to put both feet on the platform. If the dog is back towards the inside edge of running board. In order to have plenty of room on the running board, I would say the dog would have to be almost in direct line with the brake staff or slightly towards the outside edge of the running board. If the dog was farther back towards the rear, if the handhold was on this type of car, I would use it, and otherwise I would use the running board. The distance between cars, when you are coupling up, from running board to running board varies. On two cars having this type of grabiron where I wanted to jump across I would jump from one grabiron on one car to the other grabiron on the other car and if the cars did not have this type of grabiron I would not use them. In all my experience if I run cars, the car that had the convenience or it was there to use, I would use it. This type of grabiron kind of serves as a pocket for the

foot and would enable you to stand there and step over to the other car. By a pocket for my foot, I mean my foot would stand right on it, and the space varies.

"Q. Well, how would you stand, would you stand with your foot parallel with the running board or would you stand with your heel in it or with your toe toward the running board that you are going to step over on to?

A. Why, you would not do the same every time.

Q. Well, how would you do it at any time, tell us that?

A. (Witness hesitating.) I say, in stepping down in it, it would catch my heel and allow me, so that my foot would not slip off, I would then step over to the other car. I believe that is the way I would do it, which would be the best way.

Q. To step on the other handhold on the other car—on the other handhold with your toe in it?

A. It would all depend upon the distance that I was stepping.

By the Court:

Q. Why wouldn't you use the running board on which the handhold was fastened, these steps that are put on, while you are stepping across, instead of stepping on the handhold?

A. Well, it all depends upon the distance that you are stepping, Judge.

Q. Well, on a platform 11 inches broad, wouldn't it be much better than to place your foot down on a handhold that stuck out 2¾ inches?

[fol. 53] A. Well, it all depends upon, Judge, how big a space I had to step across.

Q. Well, wouldn't the other, or any place to step across—wouldn't you be safer on the running board?

A. Well, taking the slack of the cars into consideration, while moving, etc., the variance of the steps across are not the same. At the same time, you may be able to step on the platform and step on the platform on the other car, it all depends upon the space you are stepping across."

Stephen C. Lush, re-called in behalf of the plaintiff, testified as follows:

In working for the Brotherhood of Railway Trainmen a number of years and for Mr. Stiles and Davis & Michel I have had occasion to investigate the facts with regard to accidents in hundred of cases and to inspect a great many cars where handholds were defective or pulled out. For the past three years I have investigated 196 cases for the Brotherhood and about 18 of those cases have been where handholds were pulled out on different railroads and my entire work in making these investigations is about cars, to learn what condition caused the accident and to be out in the yards and observe men work. I have been practically in the yard of every railroad operating west of Detroit, Michigan; Indianapolis, Indiana; Memphis, Tennessee, west to the Montana western state line and Oklahoma and Texas, and almost every day I see men operating and working on trains. Trains are operated the same now as in the past and on every railroad it is done practically the same way.

I am familiar with the safety appliances on cars and the use for which they are put there and have made a study of that subject not only in investigating cases but as a member of the legislative board of the Brotherhood. I am familiar with tank cars similar to that in question, and I saw this particular tank car and the grabiron, and I know what use is made of grabirons situated similarly to the ones on the car in question. A grabiron on the end of a car such as the car in question is used for the purpose of men getting over between cars if they want to cross from one side of the car to the other.

On every car there is a grabiron such as this, on each side of the car on both ends, so that if there was another car coupled to this tank car, the end coupled to the car would also have a grabiron, either extending out from the car, if it was a box car, or if it was a tank car it might [fol. 54] be out or it might be down and there is also a handhold about 3½ to 4 feet from this handhold, and if a man wanted to cross over and did not choose to climb by the ladder as the men generally do not do because it takes a little more time, he simply puts one hand on each of these grabirons and swings himself up on the draw bar and then crosses over. If a brakeman goes in between for the purpose of turning the angle cock or breaking the air hose, he simply takes hold of the grabiron as a safety proposition, for fear the car might move. Where men are

passing from one car to another, particularly where trains are running, and passing from one oil tank to another there would be a running board on one car and a running board on the other and where the slack varies and the distance is considerable in stepping over, the usual practice is for a man to step from the running board and lean over and take hold of the brake wheel with your right hand and step on the grabiron with your left foot and then take hold of the railing that runs around the top of the tank. There is nothing particularly dangerous about that and I have done it and seen it done by others thousands of times and have never heard of a man being injured doing it.

This handhold is also used for the purpose of putting your foot against where the brake is situated as it is, or was, on this car, in order to spread your feet apart, in order to get better leverage in throwing your body, or releasing or setting your brake. I have seen men setting brakes on cars of the type in question here and it is customary where the grabiron is in a horizontal position for them to use that in setting or releasing brakes. I have observed it many times in different yards and have done it myself a great many times, particularly if the brake was set a little tight. Releasing or setting a brake is not done by using your strength to pull on the brake wheel. There is a knack to it. The greatest pressure is brought by throwing your body and in order to throw your body you must have your feet apart for some distance. If both feet are close together you are unable to throw your body because both your feet are locked but by having your feet spread apart, having one foot back of the other or having them stretched sideways, you are able to throw your body and have something to lever yourself with so you won't fall. In order to release the brake where the brake is set it is necessary to push the end of the dog to the right, which causes the other end of the dog to disengage from the notch in the rachet. The brake wheel turns clock-wise and in setting it a man sets it by putting his foot in behind on the right-hand side of the back end of the dog, and then he swings his body and draws the brake chain that [fol. 55] you see at the bottom of the staff and the more force he exerts on the wheel causes the brake to be set that much tighter. In releasing it you have to set it tighter so that you release the pressure on the dog before you release the dog.

When a man is releasing a brake such as this one he must have his left foot to the left of the back end of the dog and that puts his heel out pretty close to the edge of the running board. If the running board is not wide enough to place his right foot on it, then he has to pull it back again and, therefore, if he has a car that has the handhold extending out from the running board he puts his foot out over the edge of the running board and down against the bar which is running there 2½ to 4 inches. In this case the handhold was out 4 inches from the end of the running board, and he puts his right foot out there and braces it against the iron and the inside of the foot is lying against the edge of the running board and that is the only way in which he can release the brake, regardless of how much room he may have on the other side. If a man was standing on the back side of the brake and assuming there was enough room there for him, he would be unable to release a tight brake because it is physically impossible for you to throw your body around to the right and at the same time move your left foot to the left so as to move the back end of the dog to the right. It is also physically impossible to stand on the opposite side of the brake and release it.

This handhold pulled out because the running board was cracked. A grabiron used in the ordinary and usual way should sustain at least many times more than the weight of any one man or any strain that he could exert on it by releasing the brake when pulling on the brake wheel and pushing with his foot.

ROBERT J. SMITH, called on behalf of the plaintiff, testified as follows:

I live at 3151 Upton Ave. north, Minneapolis, Minnesota, and have been a railroad switchman pretty nearly 15 years. Am now working for the Soo Line. I have also worked as a switchman for the Great Northern and the Minneapolis & St. Louis. That is, I worked in the Great Northern roundhouse and for the Minneapolis & St. Louis as a clerk. During my 15 years experience as a switchman I released and set brakes on oil tank cars, including the type shown on Defendant's Exhibit "8." I have also had experience in setting brakes on box and gondola cars and cars equipped

[fol. 56] with platform brakes and I have observed men working on or about all cars and I have had occasion to spot oil tank cars at different industry tracks. I am familiar with with the safety grabiron or handhold on the end of the car and some of these extend out horizonally and others hang down. I have had occasion to release and set brakes on oil tank cars with a safety iron that extends out horizontally. To me it seems that a man puts his foot on it and uses it for support and I have done this many times. It is a common occurrence and it is commonly used by railroad men for that purpose.

Cross-examination.

By Mr. Newcome:

I have used this handhold to step on, not alone whether the brake was tight or not, but I have used it to step over on to the other cars. I don't know whether I would put my heel in it to step the cars as Mr. Irwin described, but I used it to teeter over on to the other car. If I were going to step over in this manner to another car I would reach for the brake on the other car and bear considerable weight on the grabiron and at some time or other you would have all your weight on that part. Lots of times you would reach over and lean over and kind of grab the brake staff on the other side and pull yourself up a little bit. These handholds are on all four corners of the car. On the other three corners not near the brake you could not use it in setting the brake. They are there for safety conditions. I would not specify that they were there for handholds alone, but they are there for safety conditions. I would also use them to pull myself up on the draw bar and if I was slipping I would catch myself no matter where I was, I would use anything that would save me if it would be this safety handhold or anything else.

I last performed actual work for the Soo Line the 12th of March this year.

Redirect examination.

By Mr. Davis:

I am still working for the Soo Line but it was around last March that I last did any work, but I am subject to call for service now.

[fol. 57] BRINK B. MURPHY, called on behalf of plaintiff, testified as follows:

I live at 442 Livingston Ave., St. Paul, Minnesota, and am a brakeman for the Chicago, Great Western Railroad and have worked as a brakeman for 14 years. While a brakeman for that railroad I worked in the yards at St. Paul. I have worked on cars of the character and description of that shown on Defendant's Exhibit "8" and have set and released brakes on all kinds of cars, including an oil tank car with the grabiron extending out in a horizontal position and fastened on the running board, and I have seen men doing the same work. If you have got a brake that is set too tight, that you cannot handle it, it is customary to put your foot down in there on the grabiron to get your leverage to release your dog. I have done that many times and seen other railroad men do it. I am still employed by the Great Western Railroad.

Cross-examination.

By Mr. Newcome:

On a tank car that had the handhold down or slanting diagonally out, if the brake was not set too tight I would release it without using that handhold, but if it is set too tight, or I could not, I would have to either have help or let the brake go. It may be that on a box car if the brake is too tight you can use the top grabiron. On a tank car if the dog is in that position where you have got to pry it out or kick it loose it would not be necessary to use that, but where the brake is set tight you have to have your feet spread out in order to swing your body and kick your dog. Your running board is smooth. Where you put your foot in the grabiron it gives you more pressure, while on a smooth board you have not got anything to brace your foot. The pressure that you put into it helps to release the brake.

JAMES S. MCFARLAND, called on behalf of the plaintiff, testified as follows:

I live at 518 Selby Ave., St. Paul, Minnesota, and am employed as a brakeman and conductor by the Chicago &

Great Western and have had 26 years of railroad service. I am familiar with the type of tank car involved here and have had occasion to release and set brakes on tank cars of this type and have released brakes on tank cars having the safety iron extending horizontally out from the running board. You use this grabiron when a man comes along [fol. 58] and faces the brake. He generally places himself in front of the brake so he can get the most leverage. If there happens to be a stirrup there, he would use it to get good leverage. I have done it and seen other men on the Great Western do it. Where the grabiron is in a vertical position, of course, you could not use it, but where it extends out horizontally it is the practice of railroad men to use it for the purpose of releasing the brake. I have seen this done hundreds of time.

Cross-examination.

By Mr. Newcome:

I have stepped on to this grabiron in going from one car to another but not off from it. I have used it for the purpose of stepping on and off in going across from one car to another, that is, from the platform to the grabiron. There are a number of cars that have not a grabiron that you could use for this purpose. On a car not having that kind of a grabiron, if I could not release a tight brake I would ask for help.

Reginald J. Williams, called on behalf of plaintiff, testified as follows:

I live at 1165 Armstrong Ave., St. Paul, Minnesota, and have been employed as a brakeman and conductor by the Chicago & Great Western Railroad as a brakeman and conductor going on 11 years, and at one time I worked for the Omaha Railroad between St. Paul and St. James as a brakeman for three or four months and during that time had occasion to switch cars in the yard at St. Paul and occasionally at the Minnesota Transfer. I have had occasion to work on oil tank cars of the kind and description here involved and I have worked on tank cars which had safety irons which extended horizontally out from the running board. Some extend that way and others do not. Where

the safety iron extended out horizontally I have placed my foot in it in the releasing and setting of brakes. That is a common occurrence that a man will use that grabiron for a foot step, or either a handhold, in between the cars or they will use it for jumping on the cars, as far as that goes. Whether a brakeman will use this handhold in releasing a brake depends on where the dog is. Most of the dogs are to the left. If the brake is set tight you would have more leverage, besides that, the platform is to let it off. If the brake was set tight you would have to have more leverage to let it off so the only place you have is the grabiron and it has been the common practice to use it. That is, where it is necessary to use it.

[fol. 59] Cross-examination.

By Mr. Newcome:

Some of the dogs are on the right-hand side, very few. It is practically impossible to let a brake off from the right-hand side where your dog is on the left. I cannot say offhand whether I have let the brake off on the right-hand side were the dog was on that side. If the dog is on the right, I would use my left foot for the dog and brace my foot against the draw bar, if necessary. If it is necessary I sometimes brace my feet against the draw bar. If the brake were not tight you could kick it off with your foot. If it were a tight brake you would have to use pressure to get it off. It was only when the brake was tight that I found it necessary to use the grabiron. We have tight brakes on cars that do not have this type of grabiron where the plank is of the same width. In that case it depends on how tight the brake is. If I get the leverage by putting the foot on the car, you can brace yourself on the end of the car to let the brake off, so far as that goes. On a sill car you can get up against the rib of the sill car, and brace yourself there. There is nothing that says you cannot brace yourself on the other car to let the brake off, and I have done this. You could place your foot against the pin lifter lever to brace yourself to let the brake off and I have done this. I have also used this particular type of a grabiron to step on in stepping from one car to another. I reach for the brake wheel and then I step. I put my foot on the grabiron on the car farthest from me, the one I am

going to step on. I put the ball of my foot on the grabiron to take the distance away from my step. I put the ball of my foot on the grabiron instead of putting it on the platform when it is necessary. Where the brakes are not on the ends of the cars between which I am stepping, I step on the running board to get over and there is a safety iron on the tank, but I cannot reach this until I get over on the platform of the car I am stepping on to. I would balance myself by stepping on to the grabiron or running board and then take hold of the handhold, but, of course, I cannot get ahold of this handhold until I get on the platform.

I have not worked for the Great Western since Christmas. In addition to working for the Omaha as a brakeman, I worked for it seven or eight times in the railroad shop and then I went out and became a brakeman.

[fol. 60] JAMES R. VAUGHN, called on behalf of the plaintiff, testified as follows:

I live at Sioux City, Iowa, and am 50 years of age. I was formerly employed by the Omaha Railroad. I started to work for it November 10, 1917. Before that I worked for the Chicago, Burlington & Quincy and the Chicago, Milwaukee & St. Paul. I started railroading in 1902 and worked as a brakeman and conductor. I first worked for the Denver & Rio Grande and then for the Milwaukee as brakeman and conductor and in working for the Burlington I worked as a conductor. In working for the Omaha I first worked as a brakeman and did some work as a conductor, not much. My work was on freight trains and I worked on the west end of the western division of the Omaha from Sioux City to St. James and to Worthington and Hospers and I was also on the Sioux City-Sioux Falls line. I have become familiar with tank cars similar to the car in question and have worked on tank cars without end sills where the grabiron or safety iron is fastened to the running board by bolts and then extends out in a horizontal direction. I have set and released brakes on that kind of cars. I know from my experience on the Omaha that it has been the custom and practice of railroad men to use these safety irons as a rest for their feet in releasing or setting brakes and I have done it many times myself.

I am acquainted with Mr. Swinson and have worked with him on the same run. I have seen other employes use this safety iron as a rest for the foot when releasing brakes. Some of these cars have safety irons extending down vertically and you cannot use them in releasing a brake. I have seen these safety irons used as a foot rest for the men in stepping from one car to another and I have sometimes used it when it was in a horizontal position, and when in that position it is customary for the men to use it for their feet to step from one car to another and when releasing brakes. I left the service of the Omaha two years ago and since that time have lived in Sioux City where I take care of my own property and stuff.

Cross-examination.

By Mr. Newcome:

I started to work for the Denver & Rio Grande Railroad around 1902 and worked about two months, I guess it was. After that I came back to Sioux City and went to work for the Milwaukee and worked for it nearly five years and then I worked for the Burlington. I have worked for the Burlington three times and the last time I worked for it was [fol. 61] approximately six years. I worked for the Omaha from November, 1917, until July, 1931.

In stepping over between cars I would put the ball of my foot on the grabiron and would step from the grabiron on one car to the platform on the other car and then I would step from the platform on one car on to the grabiron on the other car, just like you are taking a step. You would have your weight on the grabiron with one foot and if you had hold of something you would step off the grabiron on to the running board. If it happened to have the brake on that end of the car I would take hold of the brake wheel. If there was no brake on the end of the car and if I figured that it was too wide for me, I would walk around the end of the car where it was narrower and then I would step across and grab ahold of the safety railing around the car. Defendant's Exhibit "9" shows the safety railing I am referring to. If it was not the brake end of the car, I would step from platform to platform. It would only be where I was stepping on to a car that had a brake that I would use the grabiron to step on and take hold of the brake and at

all times I would keep to the outside of the rail, where there was not a brake on the end of the car I was stepping on to I would not step across from the grabiron but would step from running board to running board for safety.

JENS P. JENSEN, called on behalf of plaintiff, testified as follows:

I live at 3017 Aldrich Ave. south, Minneapolis, Minnesota, am 43 years of age and my experience on the railroad is about 18 years, about 15 years as a car builder and 3 years in the bridge and building department. I have had experience in building a car from the rail up and in putting on all the safety appliances and have had occasion to test the strength of these handholds when they are attached to the running board, and I have seen cars similar to the car shown in Defendant's Exhibit "8," and I have worked on tank cars, in repairing them and some cars have these grabirons fastened into the running board extending out in a horizontal position and I have worked on cars of that kind. I worked for the Minneapolis & St. Louis Railroad and also for the Western Fruit & Express Company and a little while for the Milwaukee, and I have had occasion many times to remove these grabirons from cars.

[fol. 62] Cross-examination.

By Mr. Newcome:

I am doing odd jobs around town at the present time and it is three years since I worked for a railroad and that was the Minneapolis & St. Louis Railroad and they did not build any tank cars.

H. G. OTTINGER, called on behalf of plaintiff, testified as follows:

I live at 991 Jamieson Ave., St. Paul, Minnesota, am 51 years old and am employed by the Chicago & Great Western and have been employed by it since February 19, 1923. Before that I was employed by the Northern Pacific Railway for three years and that was my first railroad work. I was

employed as a brakeman and have had 13 years experience as a brakeman. I worked out of Duluth for the Northern Pacific and since I have worked for the Great Western, doing work as a brakeman and switchman at St. Paul. I have seen tank cars similar to that shown in Defendant's Exhibit "8" and am familiar with the make and construction of a car of that type with grabirons extending out horizontally from the running board and I have worked on or about cars of that kind and have seen men working on the Great Western and Northern Pacific working on cars of that kind. I know from my own experience that men releasing or tightening brakes on cars that had the safety iron extending in a horizontal position use their foot as a brace when releasing the brake. I have done that hundreds of times and have seen other men do it in St. Paul and on the road and at the Minnesota Transfer. I am still employed by the railroad company and subject to call and the last trip I made was January 1st, this year.

Cross-examination.

By Mr. Newcome:

I have used the handhold on the end of the tank car of the kind in question to step between cars. That is done different ways. Sometimes I would step on the handhold or the safety iron of the car that I am on with the ball of my foot and I step clear over on to the other platform, and, then, again, other times if the step does not come out right I will step over on the other safety iron on the other car that I am stepping on to. I would place the ball of my foot on the safety iron of the car that I would be stepping from by putting the heel of the foot on the platform and in that fashion, the ball of my foot comes right down on the safety iron and you step over. The ball of my foot goes on this [fol. 63] safety iron and your toe doesn't go anywhere. I would put the ball of my foot down an inch and three-quarters below the surface of the running board, and at that time the other foot would be reaching over to the other car and during the time that I was stepping over I would rest on the grabiron in that fashion and then reach my other foot over. I never slipped off with my foot.

Plaintiff rests (502).
Defendant rests (502).

Motion for Directed Verdict

"Mr. Newcome: The defendant now, at the close of all the testimony, moves the court to direct a verdict in favor of the defendant on each and all of the following grounds:

(1) That there is no substantial evidence to justify a finding of liability against the defendant.

(2) There is no substantial evidence of any negligence of the defendant in this case.

(3) There is no evidence that the negligence of the defendant, if there was any such negligence, was the proximate cause of the accident involved in this action, or the plaintiff's injuries.

(4) There is no substantial evidence that the defendant violated any provisions of the Safety Appliance Acts relating to handholds, grabirons or running boards.

(5) There is no substantial evidence that the defendant violated any provision of the Safety Appliance Acts intended for the protection of the plaintiff, under the circumstances disclosed by the evidence in this case" (503).

Motion for directed verdict argued by counsel in the chambers of the court (503).

Directed Verdict for Defendant

Statement of the Court:

"The Court: A motion has been made in this case by the defendant, for a directed verdict in favor of the defendant on the several grounds stated in the motion, and the matter has been argued quite thoroughly before me.

This is an action for personal injury brought by the plaintiff against the defendant on the charge that the defendant was negligent in that it failed to equip its tank car with certain safety appliances. The charge made is that the defendant was in duty bound to the plaintiff to equip the tank car in question with running boards around the [fol. 64] car and across each end of the car, and to equip the car with handholds or grabirons on the ends and sides of the car, and that both should be secure and maintained

as secure handholds and running boards. And it is claimed that the running board furnished was not secure, and was not safe, and that the grabiron or handhold which was used by this plaintiff at the time of the accident was not secure, that it was defective, and that the running board was cracked, and was in such condition that the bolt pulled through it, causing the plaintiff to fall and injure himself. The statute of the United Statecs provides that it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

And there is a further provision that all cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure handholds or grabirons at the tops of such ladders. Under the law, it was necessary for the defendant to equip this car with secure handholds, and with secure running boards and to maintain them in that condition. The car was being used in interstate commerce, and the railroad was engaged in interstate commerce, and operated an interstate commerce road, and this car was such as it was required under the Safety Appliance Act to be properly equipped with secure running boards and handholds or grabirons.

It is only where a defendant has failed in its duty to the plaintiff that the plaintiff can recover damages, and the action here is predicated upon the proposition that the defendant was negligent in that it failed to properly equip this car in question with proper and secure running board and grabirons or handholds at the end. In other words, it is the claim of the plaintiff that his particular running board was insecure for the purpose for which it was intended to be used, and that the grabiron was also insecure for the purposes for which it was intended to be used. If a carrier fails in this duty, he is liable for the damages which are occasioned to a person who is in the employ of the carrier, under the Employers' Liability Act.

In this case the claim is that the plaintiff was standing upon the running board and attempting to release a tight brake, and that he placed his left foot upon the running

board in such a position that he would be enabled to throw [fol. 65] off or kick off the dog—to manipulate the dog with his left foot, and he placed his right foot, for the purpose of bracing himself, upon the grabiron or handhold, and that the grabiron gave way under his weight, and the pressure applied to it, and he fell.

Each one of these appliances provided for by the Safety Applicance Act had some purpose. The running boards were applied for a purpose, and so was the grabiron or handhold.

It is the claim here upon the part of the defendant that the handhold was not intended to be used as it was used by the plaintiff.

It is claimed here by the defendant that the running board was a proper place and was intended as a place where the brakeman should stand in manipulating the brake, or for any other purpose which a running board is intended for; it is evidently intended to be used by brakemen in operating the brakes, and it is very plain that it was intended to be used by a brakeman to stand on when he sets or releases the brake. But it is claimed that the handhold was not for that purpose; that its purpose was entirely a different purpose than that; that it was to catch hold of with the hand, and used in various manners in which handholds are used for the safety of the operator.

There was testimony here that it was used for the purpose of people who were inspecting the car, for the purpose of the men who went to clean the cars, for any reason, and maybe for other purposes, but the intention is that it was intended to be caught hold of with the hand, and not to be used as it was used in this case as a brace for operating the switch. The act of congress intended it for certain uses, and the one in question here is what was the use that was intended by the act of congress? Evidently the Interstate Commerce Commission did not think that it was to be used as a place to stand on in operating a brake, or to be used as a brace. If it were intended by the statute for that purpose, then, it should not only be there, but it should be in a position where it could be used for that purpose. The Interstate Commerce Commission evidently did not think it was to be used for that purpose because it provided grabirons or handholds at the ends of a car in places similar to this, or like this, or on other cars, which could not be used for the purpose of stepping on to

as a brace while setting a brake. They provided handholds which extended vertically down from the running board, instead of extending out, as this one did. If this handhold had not been there, this plaintiff could not have stepped upon it, and if the act of congress intended that the handhold should be there for him to step on, then, the Com-
[fol. 66] pany would be liable in damages if it failed to have it there, and the accident occurred by reason of that fact, or as the proximate result of that fact. To my mind, at least, the Interstate Commerce Commission was not of the opinion that that was the purpose of the handhold.

Evidence has been introduced here, numerous witnesses have been sworn, testifying pro and con upon the question of whether a brakeman would use that handhold in that position when he was in the performance of setting or releasing a brake. A large number of witnesses have testified that they did use it for that purpose, and a large number of witnesses have testified that they never used it for that purpose. This was evidently an attempt to show that there was a custom of the railroad to use it for that purpose. In my judgment, it falls short of showing a custom. In order to show a custom, it must appear from the evidence that it was uniform, that it was constant, that it was known by all the parties concerned, or that it was universally used, that any intelligent person would know that that was the custom, but here are a lot of men who come here and say that that was not the custom, that they did not use it that way. I am satisfied that the evidence is not sufficient upon which the jury could say that that was a custom that was established as one of the uses of the grabiron or handhold. If that was not the purpose of the handhold, if congress in passing this act did not intend that the handhold should be so used then the plaintiff was using it for a purpose that was not intended by congress. The very position and form of a handhold would indicate that it was not intended for that purpose. Some witnesses have testified here that they would use it to step on in stepping from one car to another, and some witnesses have testified that while they would not do that, they would step from one car on to the end iron on the end of another car, but it is perfectly apparent that that was not a use for which congress intended it to be used, and that it was a dangerous thing to so step from one car to another; con-

gress would not provide a thing that was dangerous in operation as a safety device, and it is quite apparent that it was more or less dangerous for any person to attempt to use it as a brace for this purpose; it might become slack and worn and insecure, and it was never intended, in my judgment, for the purpose of being used as a running board to stand on, or as a platform or a place to stand on when he was setting or releasing the brake. If that is true, then, it was not the duty of the Railroad, the carrier, to furnish a grabiron for that purpose, and when he used it for that purpose he was not within the statute.

It is my opinion that the evidence conclusively shows [fol. 67] that the plaintiff was using the handhold at the time of his injury to stand on when he was releasing a tight brake, and that such use was not intended by the Safety Appliance Act, and was not contemplated either by congress or the Interstate Commerce Commission as a place for a brakeman to stand on in operating the brake. And if the Interstate Commerce Commission and the congress, in prescribing the handhold, and its position and fixation at the end of the running board, did not place it there for that purpose and that the plaintiff, at the time of the accident, was not in a situation where either the absence or insecurity of the prescribed handhold operated as a breach of duty imposed for his benefit under the Safety Appliance Act, then, it is his own negligence; it is not the negligence of the Company, and it is for that reason I am satisfied that it is my duty to direct a verdict in favor of the defendant, and I so direct it."

"Have you a verdict, Mr. Clerk?

(Verdict submitted to the court by the clerk.)

The Court: I will appoint you, Mr. Gustafferson, as foreman of this jury, and ask you to step up here and sign this verdict.

(Mr. Gustafferson does so.)

The Court: I suppose, Mr. Davis, before I discharge the jury you may wish to take an exception to my ruling?

EXCEPTIONS TO COURT'S RULINGS

Mr. Davis: Yes, your Honor. I desire to take an exception to the court directing a verdict in favor of the defend-

ant in this case on the grounds stated in the motion of defendant's counsel, and also on the grounds as stated in the memorandum decision of the court, and I also except to the refusal of the court to submit to the jury the issue of the violation of the Safety Appliance Act with reference to the running board and its defective condition, as being the proximate cause of the accident.

And I also except to the refusal of the court to submit to the jury the issue of the defective condition of the grab-iron as being the proximate cause of the accident.

And I also except to the refusal of the court to submit to the jury the issue of negligence under the common law, on the ground that the evidence clearly showed that the defendant failed to exercise reasonable care to provide a reasonably safe place and a reasonable instrumentality with which the plaintiff could do the work in question. I think that is all.

The Court: Exceptions will be noted, of course.

Mr. Davis: May we have a 42 day stay?

The Court: Yes, you will be allowed 42 days."

[fol. 68] IN UNITED STATES DISTRICT COURT

STIPULATION FOR APPROVAL OF BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective counsel, that the annexed bill of exceptions, which has been duly served upon counsel for defendant, is hereby agreed upon, and that the same, together with the exhibits referred to and made a part thereof, contains all of the facts, records, documents and proceedings which are necessary and essential to a determination of the questions involved upon the appeal herein.

It is stipulated further that said bill of exceptions may be presented to and settled by the court without notice.

Dated this 19th day of February, 1934.

Davis, Michel, Yaeger & McGinley, Attorneys for Plaintiff. William T. Faricy, Warren Newcome and Alfred E. Rietz, Attorneys for Defendant.

In United States District Court

Order Settling Bill of Exceptions

The foregoing and proposed bill of exceptions being presented to the court by the attorneys for both plaintiff and defendant herein for approval and allowance, and it appearing to the court that said bill of exceptions has been duly served upon counsel for the defendant and that counsel for both plaintiff and defendant have stipulated that said proposed bill of exceptions may be settled by the court without notice, pursuant to the terms of the stipulation attached hereto, and the court being advised in the premises.

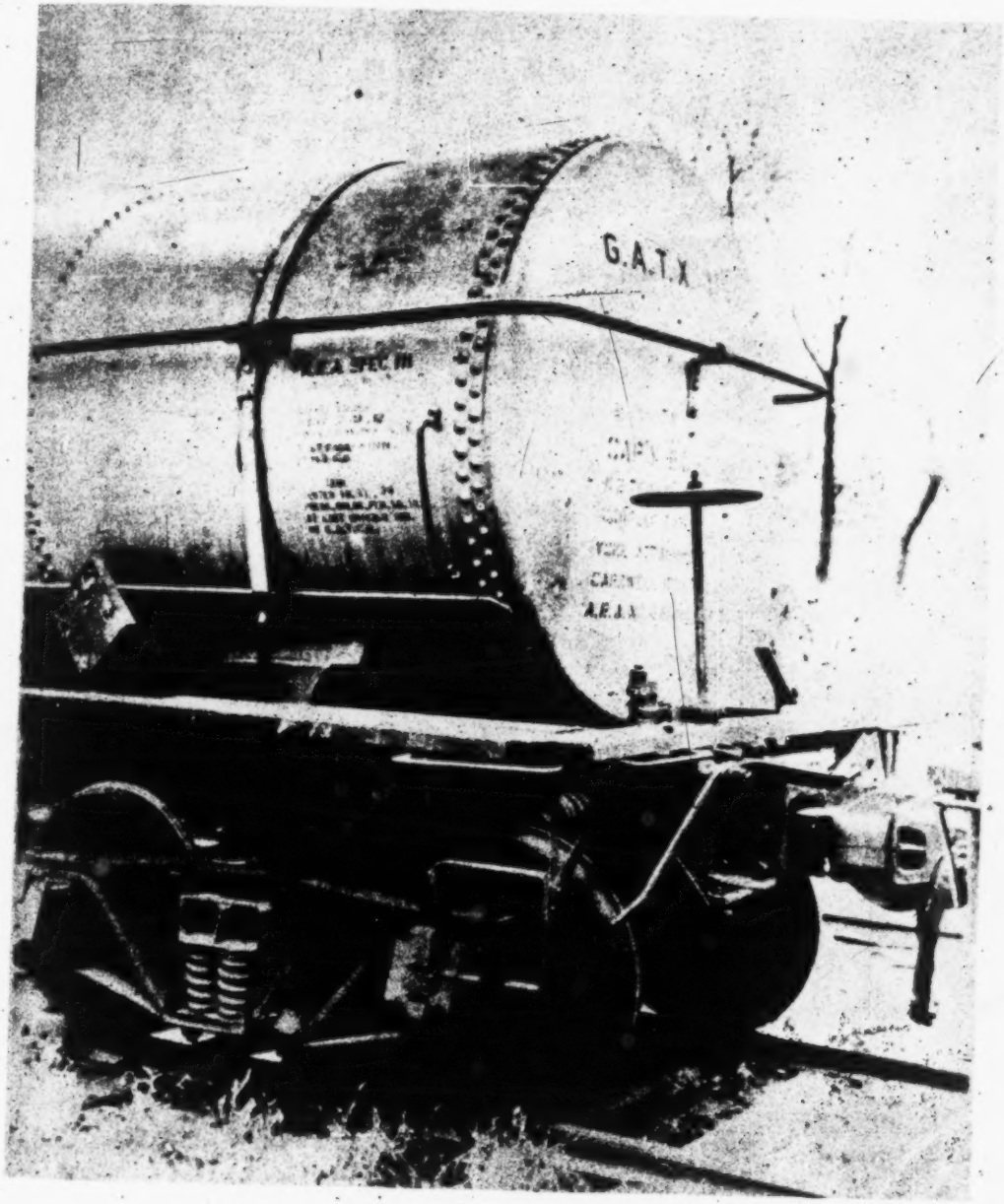
It is ordered that the said proposed bill of exceptions attached hereto be allowed and settled as the bill of exceptions in the above entitled action. Said bill of exceptions contains all of the facts, records, documents, evidence and proceedings which are necessary and essential to a determination of the questions involved upon the appeal herein.

Dated this 20th day of February, 1934.

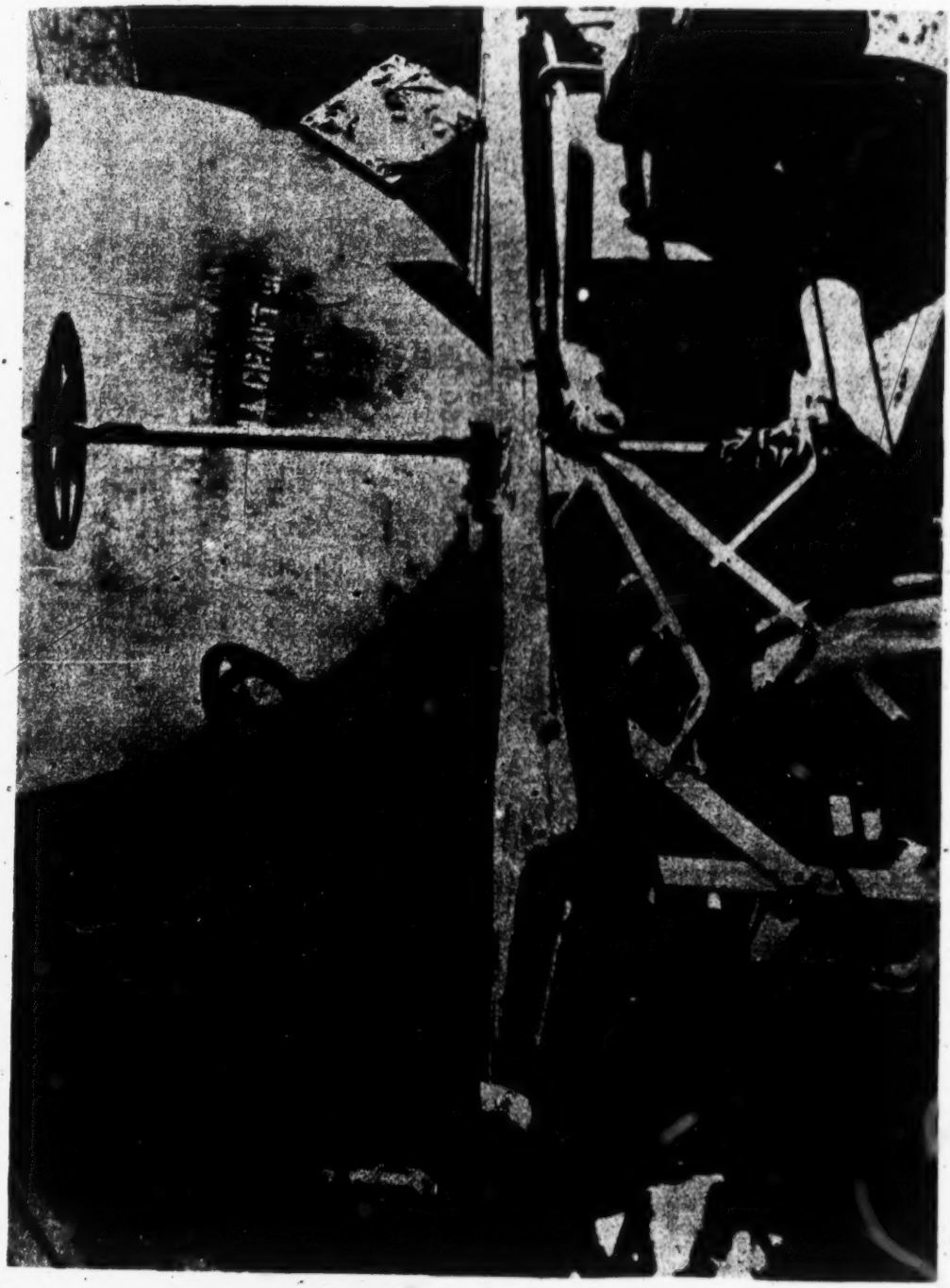
Joseph W. Molyneaux, United States District Judge.

[File endorsement omitted.]

74 Plaintiff's Exhibit A

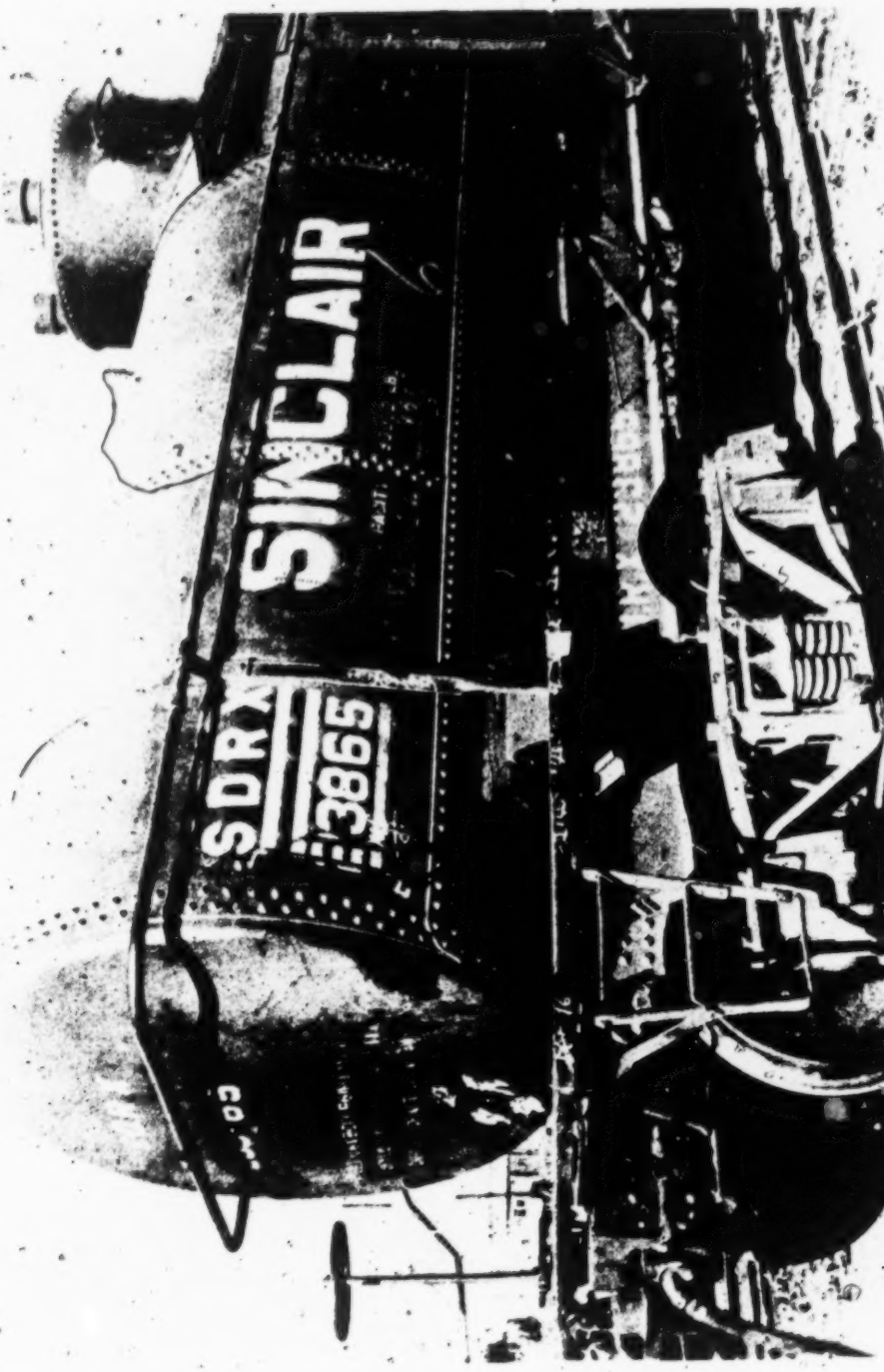


75 Defendant's Exhibit 8

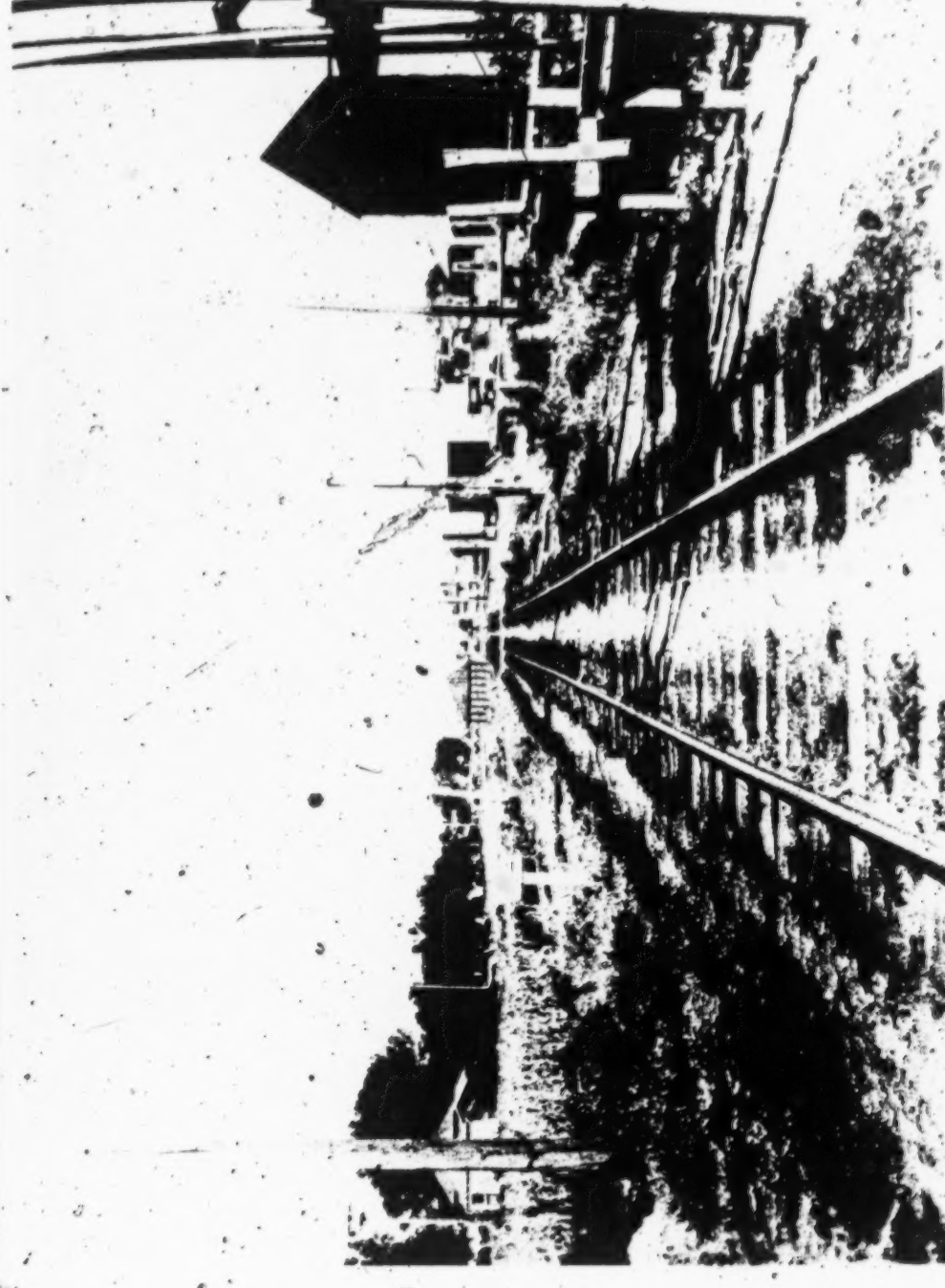


81
73-74

76 Defendant's Exhibit 9



77 Defendant's Exhibit 10



83

77-78

'78 Defendant's Exhibit 11

[fols. 79 & 80] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER FOR TREATMENT OF DEFENDANT'S EXHIBIT NO. 12 AS EXHIBIT OF MATERIAL—Filed February 23, 1934

It is stipulated by and between counsel for the respective parties that the following exhibit may be treated as a physical exhibit:

Defendant's Exhibit 12.

Tom Davis, Ernest A. Michel and Carl L. Yaeger, Attorneys for Plaintiff. William T. Faricy, Warren Newcome and Alfred E. Rietz, Attorneys for Defendant.

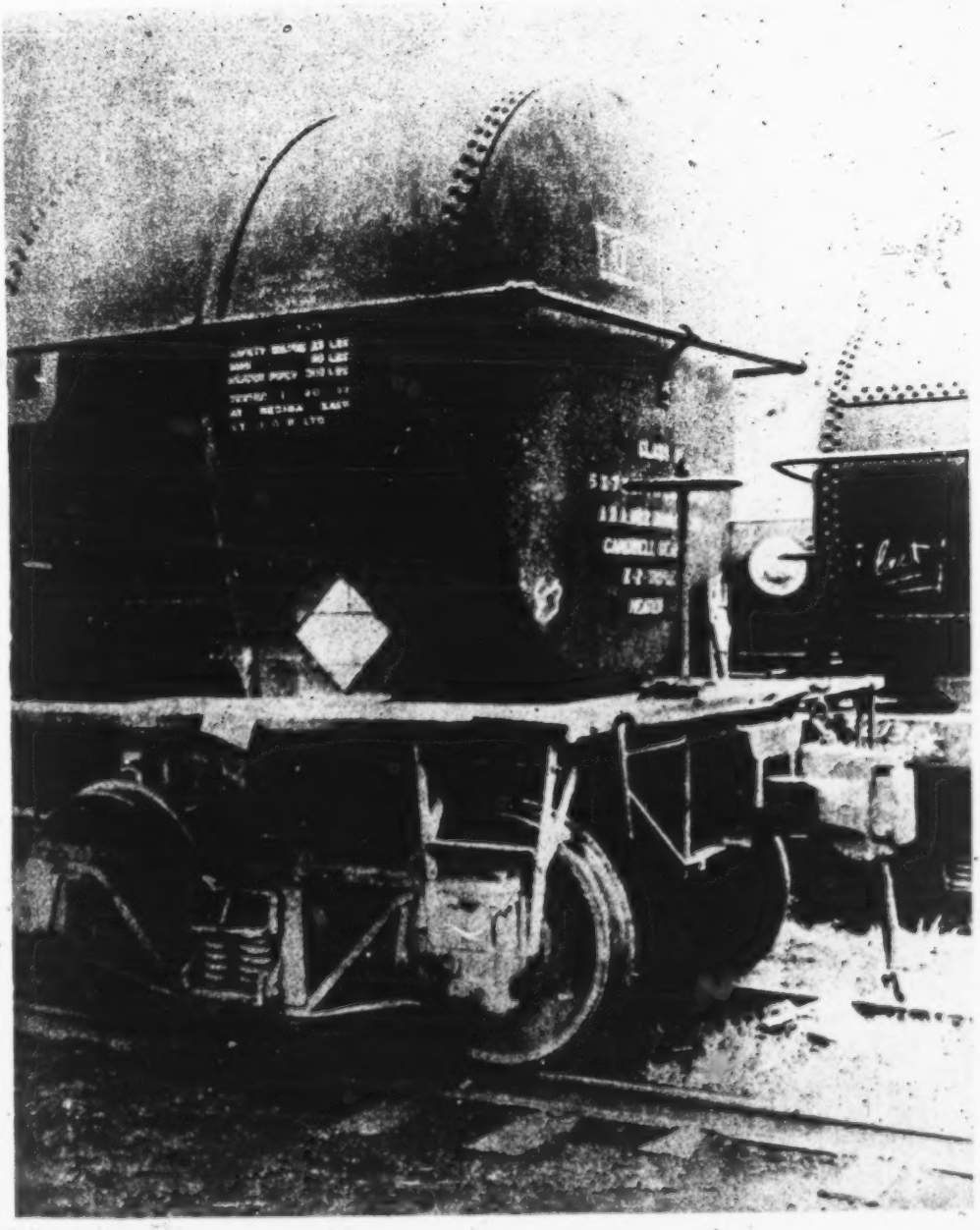
Order

The within stipulation is hereby approved and the clerk is directed to forward to the clerk of the Court of Appeals for use at the hearing of the appeal as a physical exhibit the exhibit above listed.

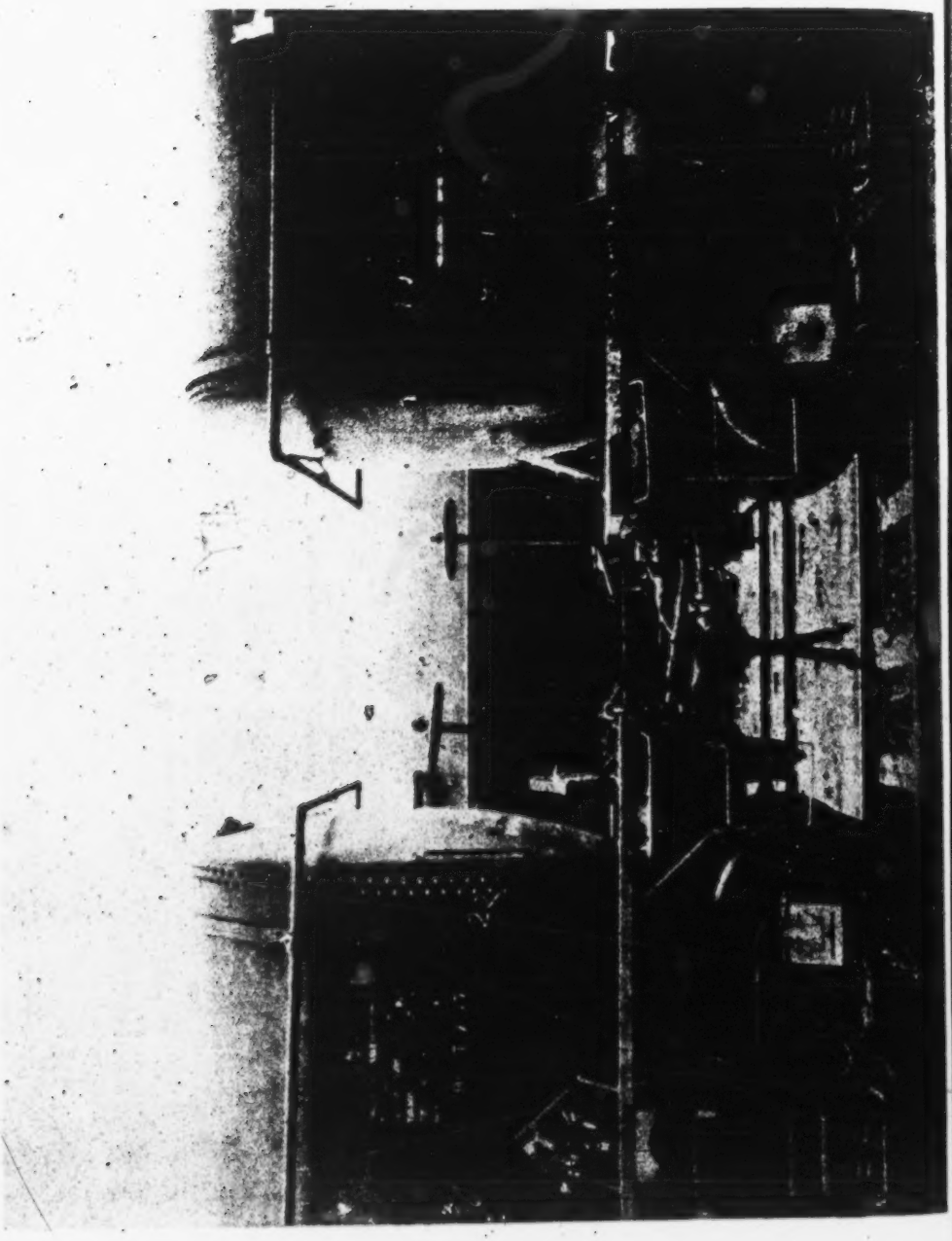
Dated Feb 23, 1934.

Gunnar H. Nordbye, District Judge.

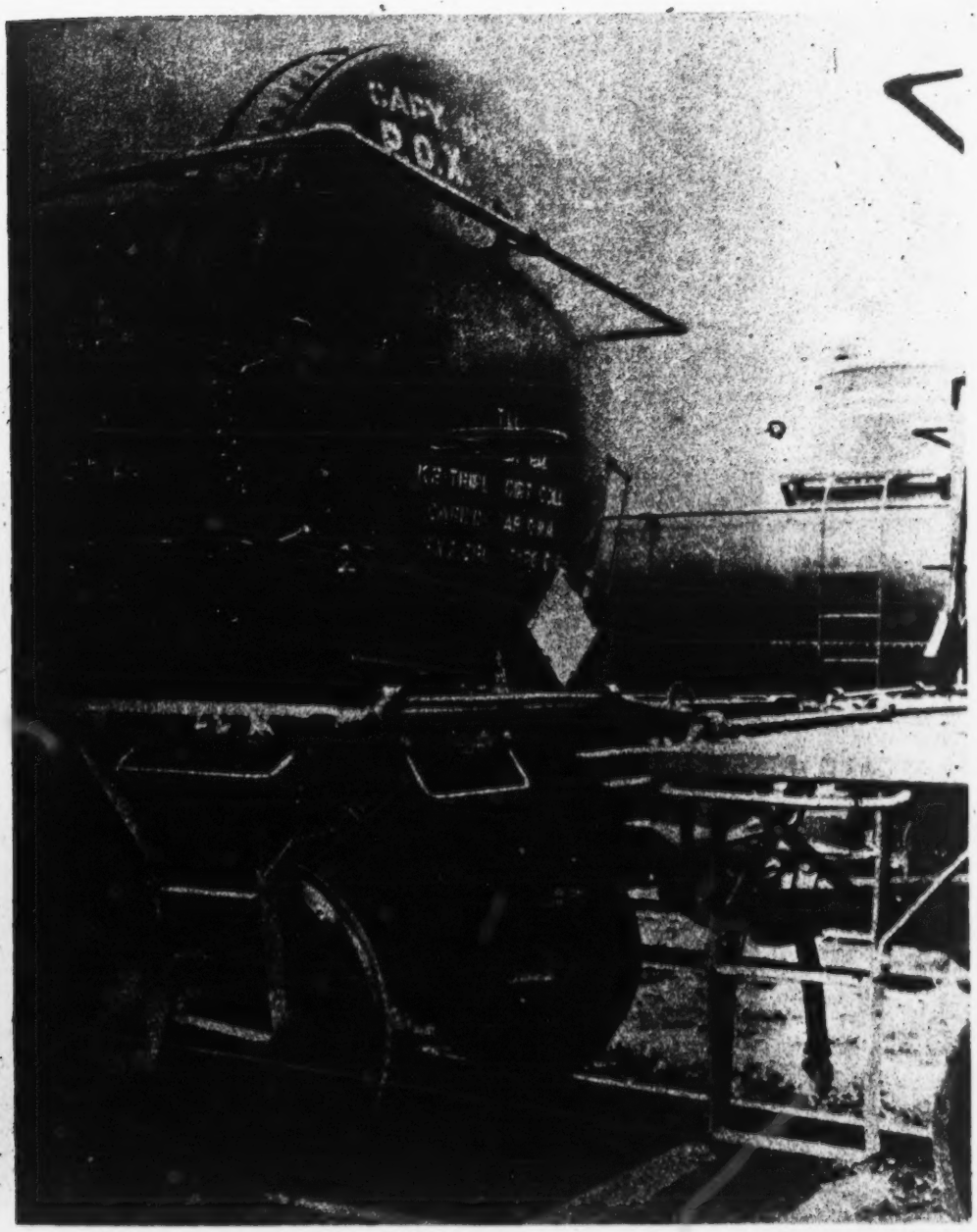
80 Defendant's Exhibit 13



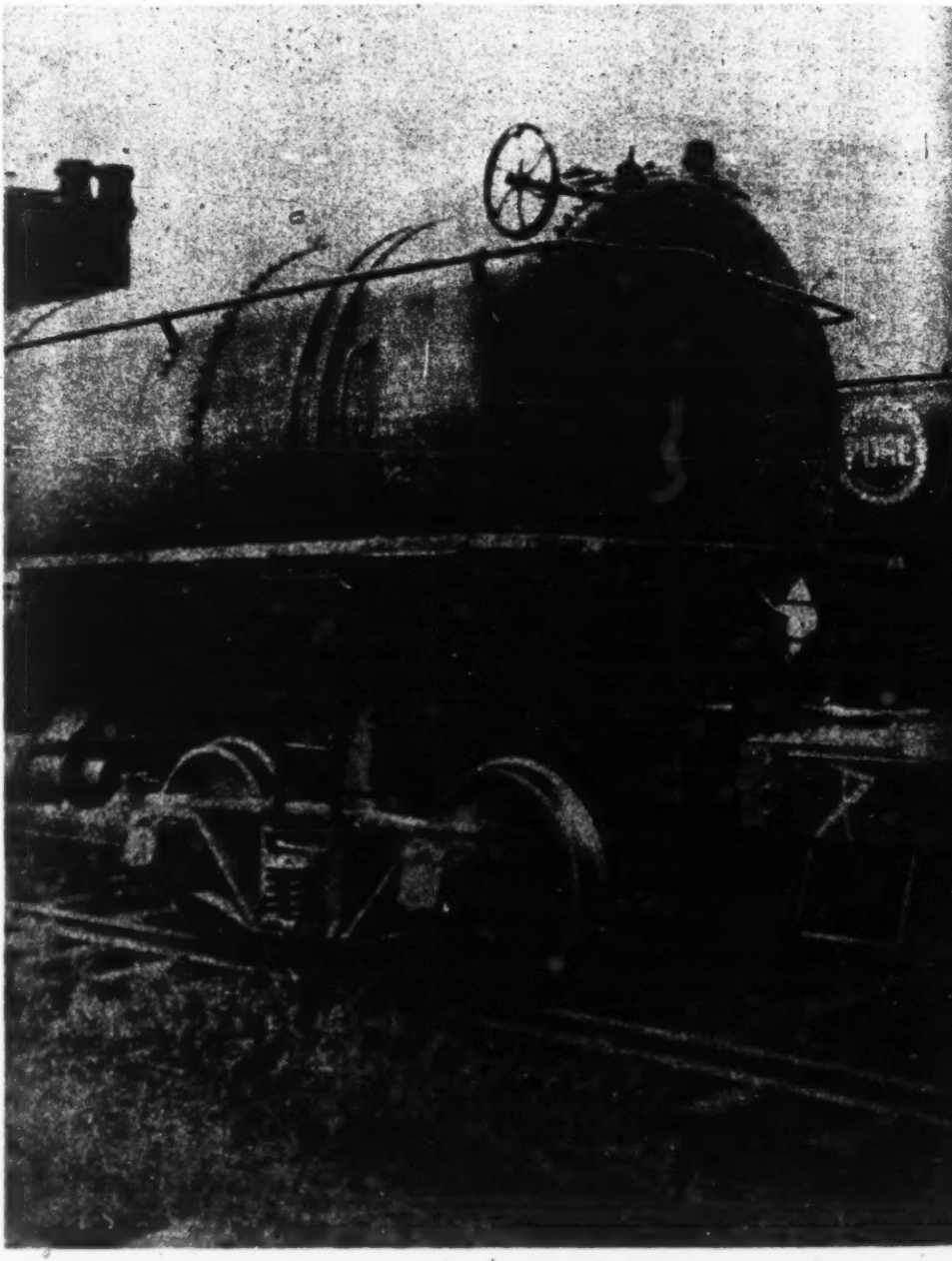
81 Defendant's Exhibit 14



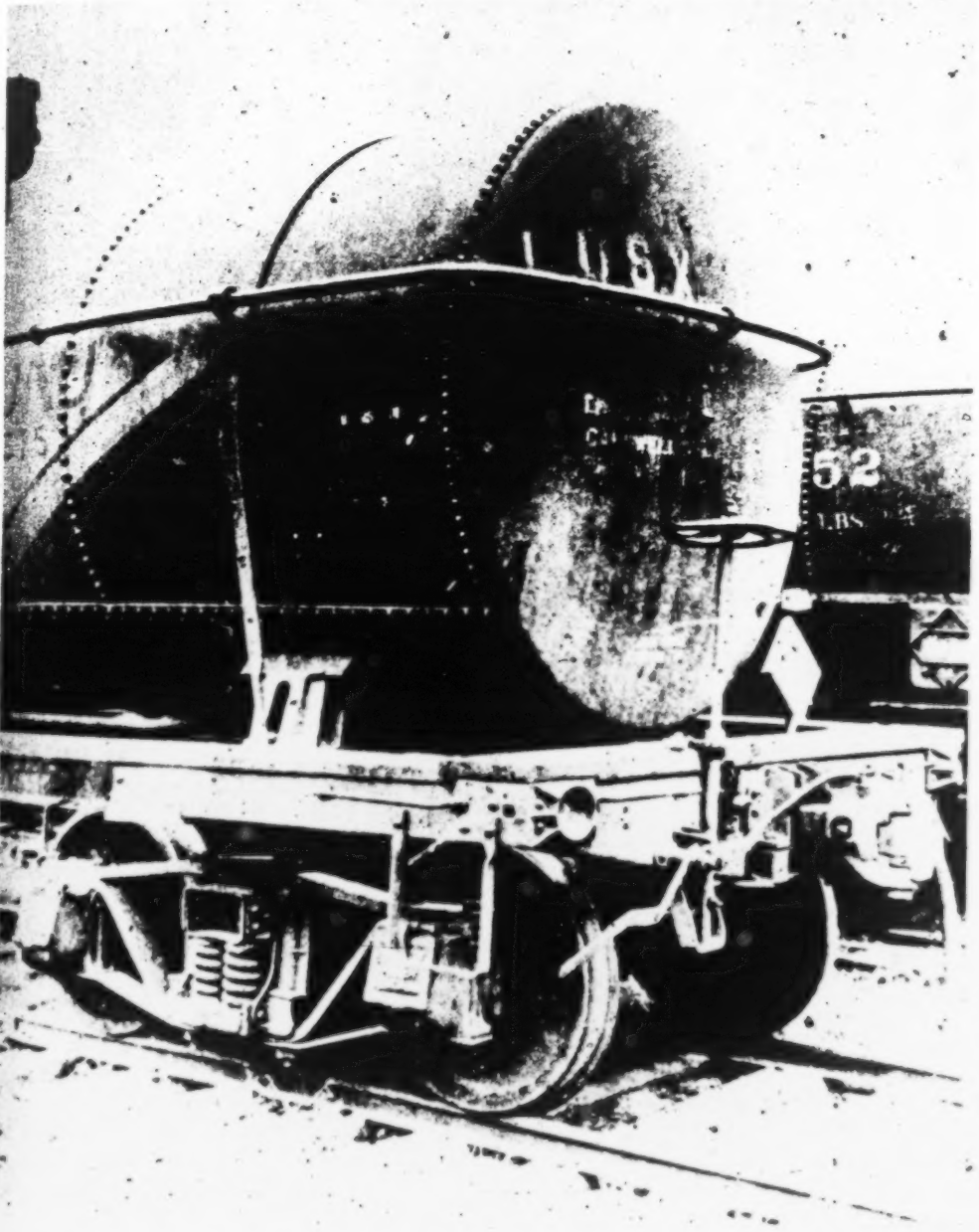
82 Defendant's Exhibit 15



83 Defendant's Exhibit 16

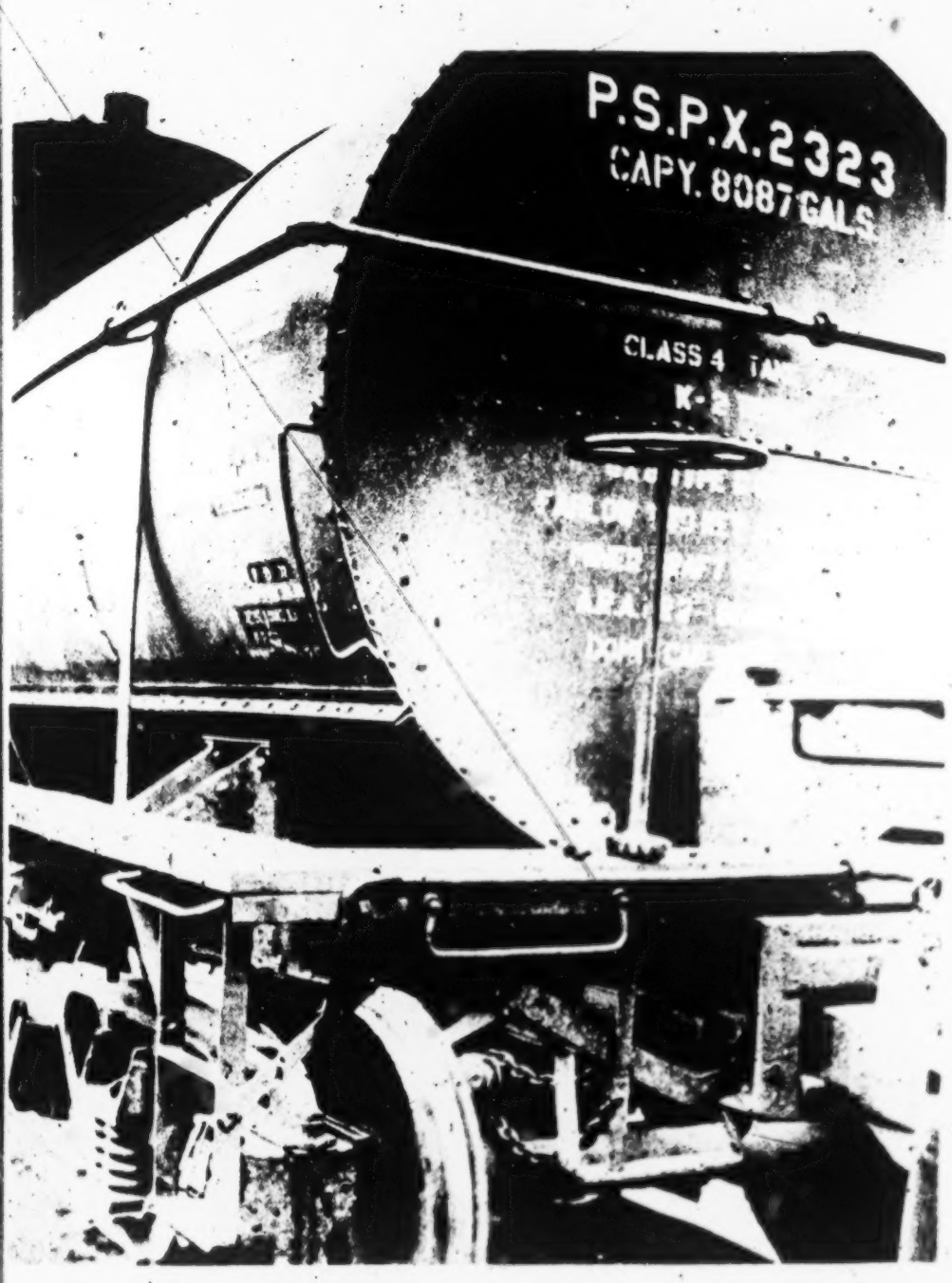


84 Defendant's Exhibit 17

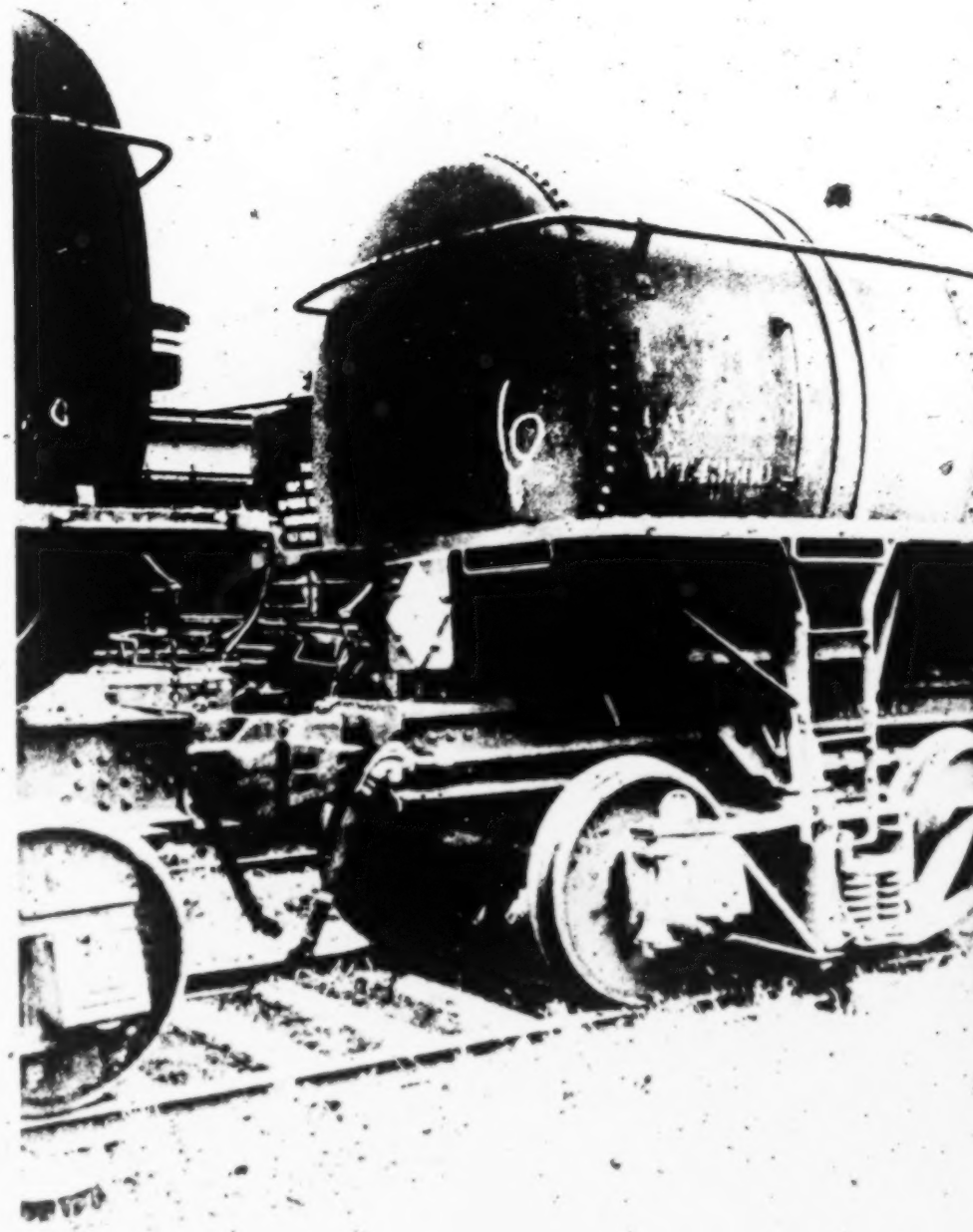


85 Defendant's Exhibit 19

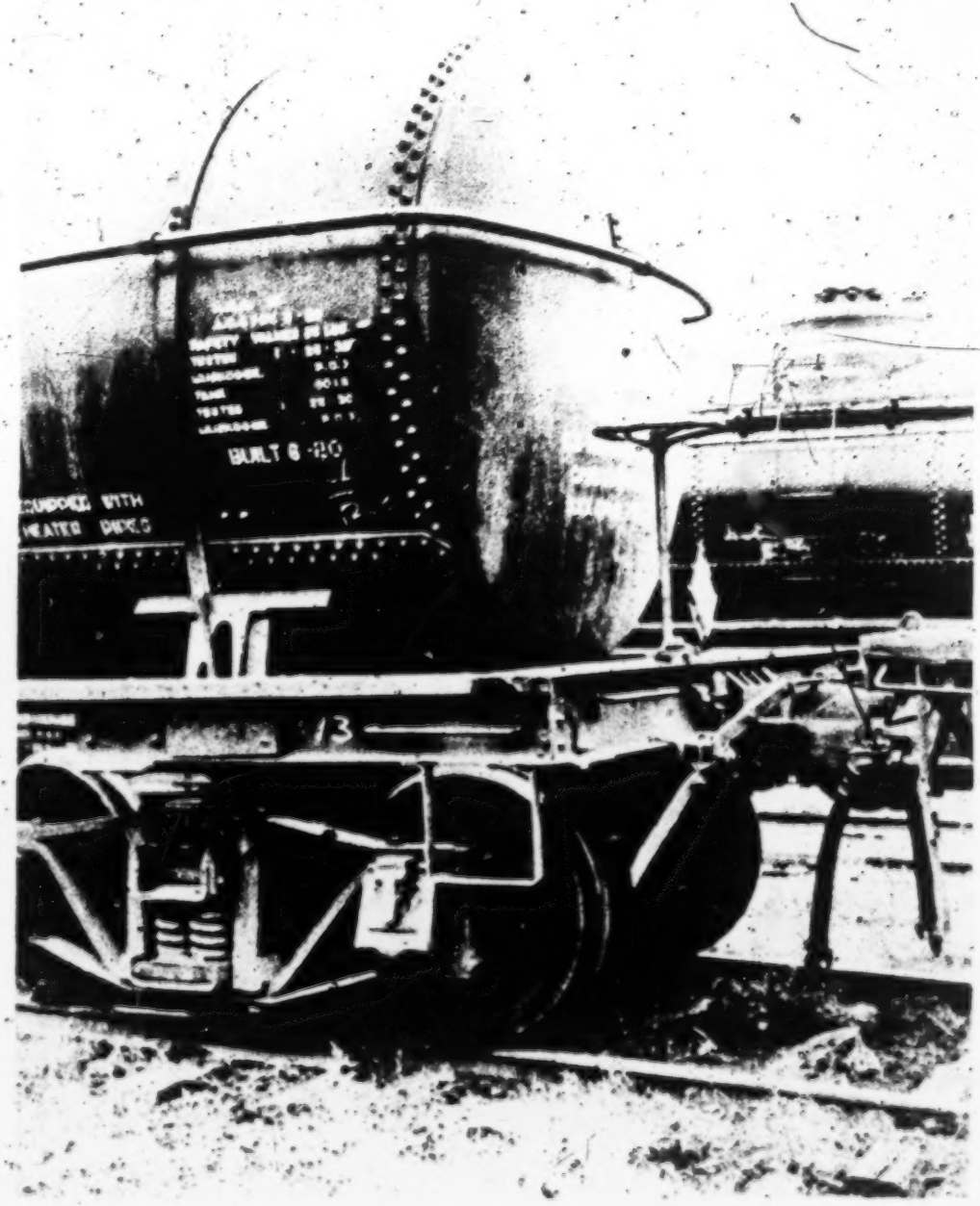
86 Defendant's Exhibit 20



87 Defendant's Exhibit 21

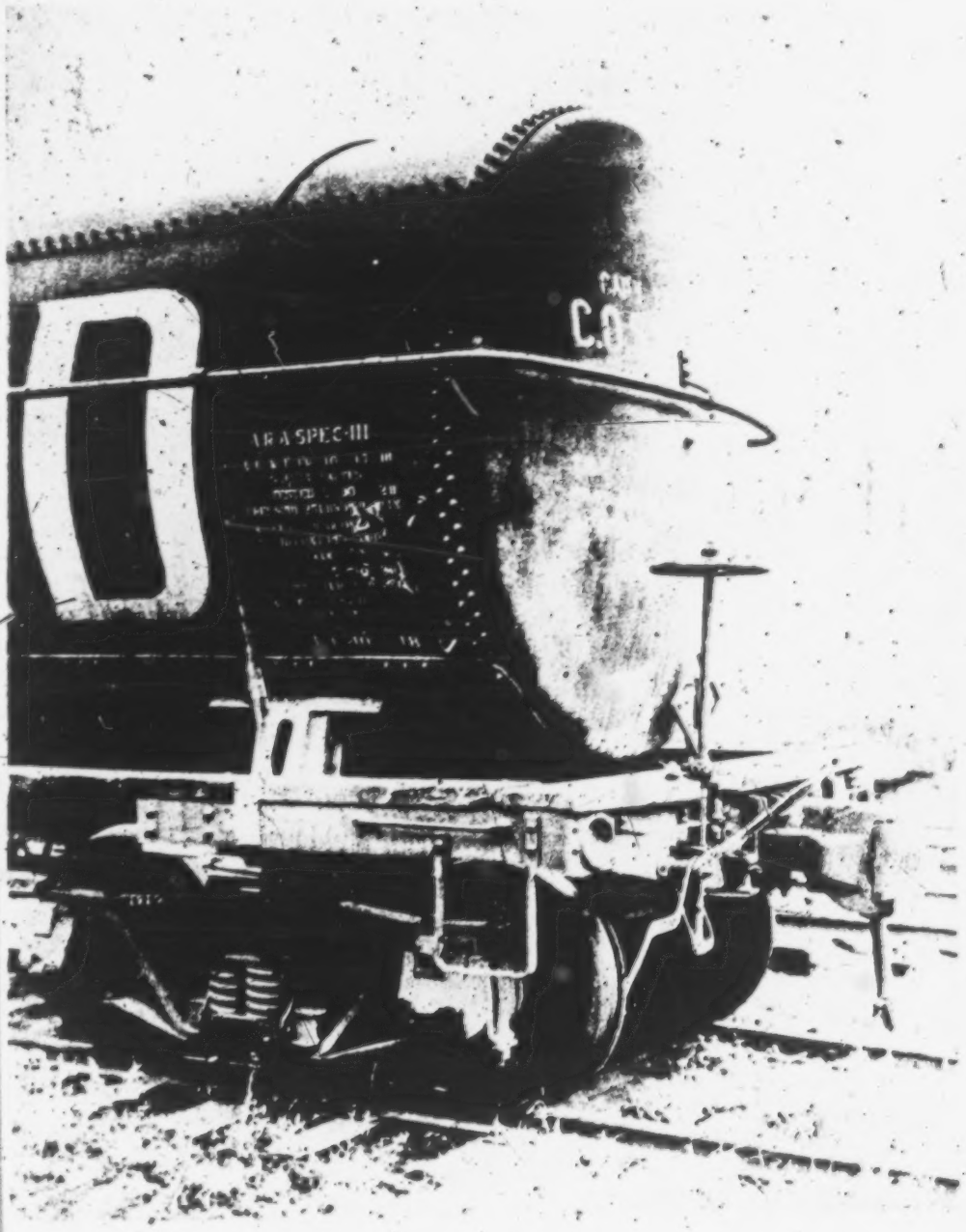


88 Defendant's Exhibit 22



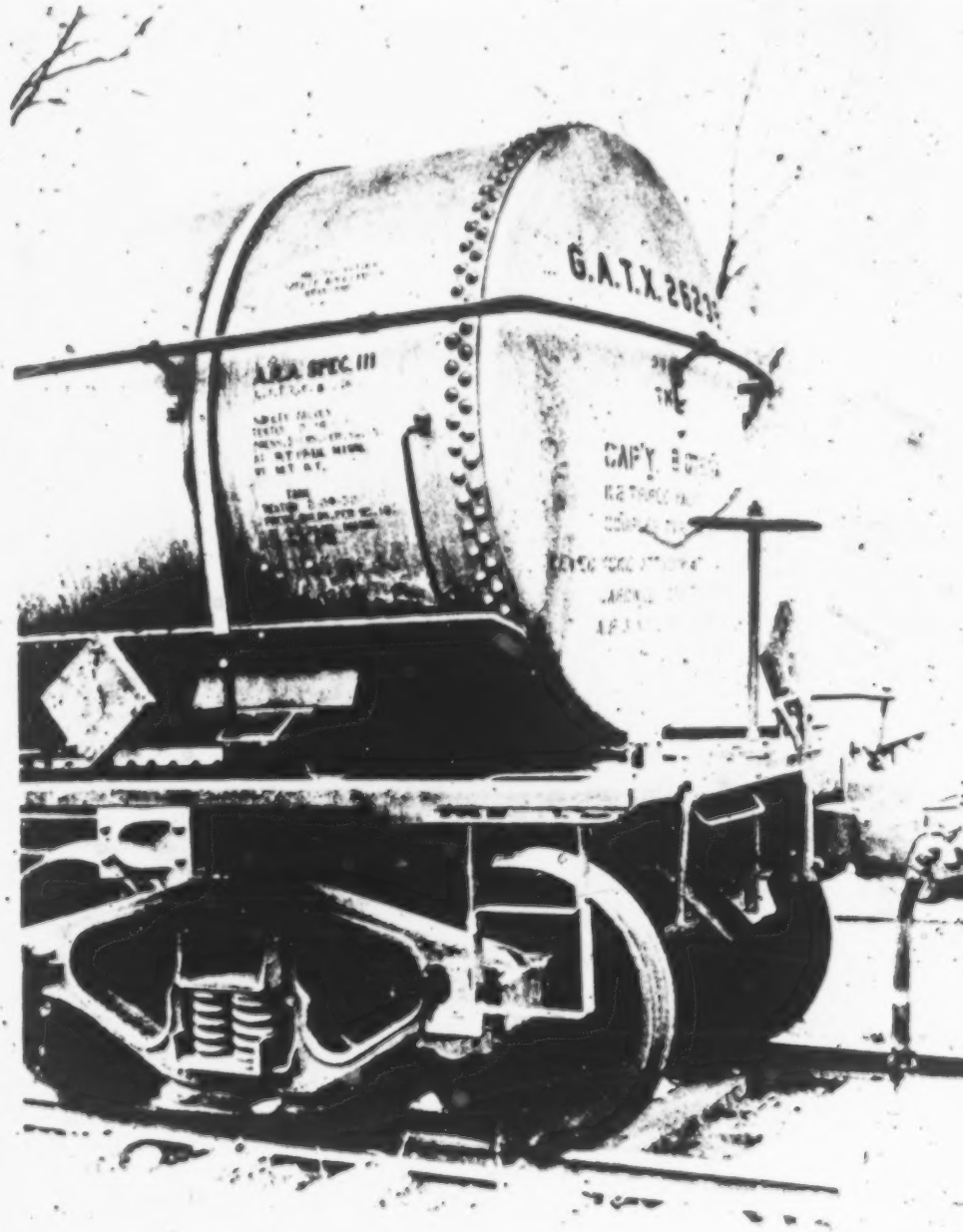
94
99-100

89 Defendant's Exhibit 23



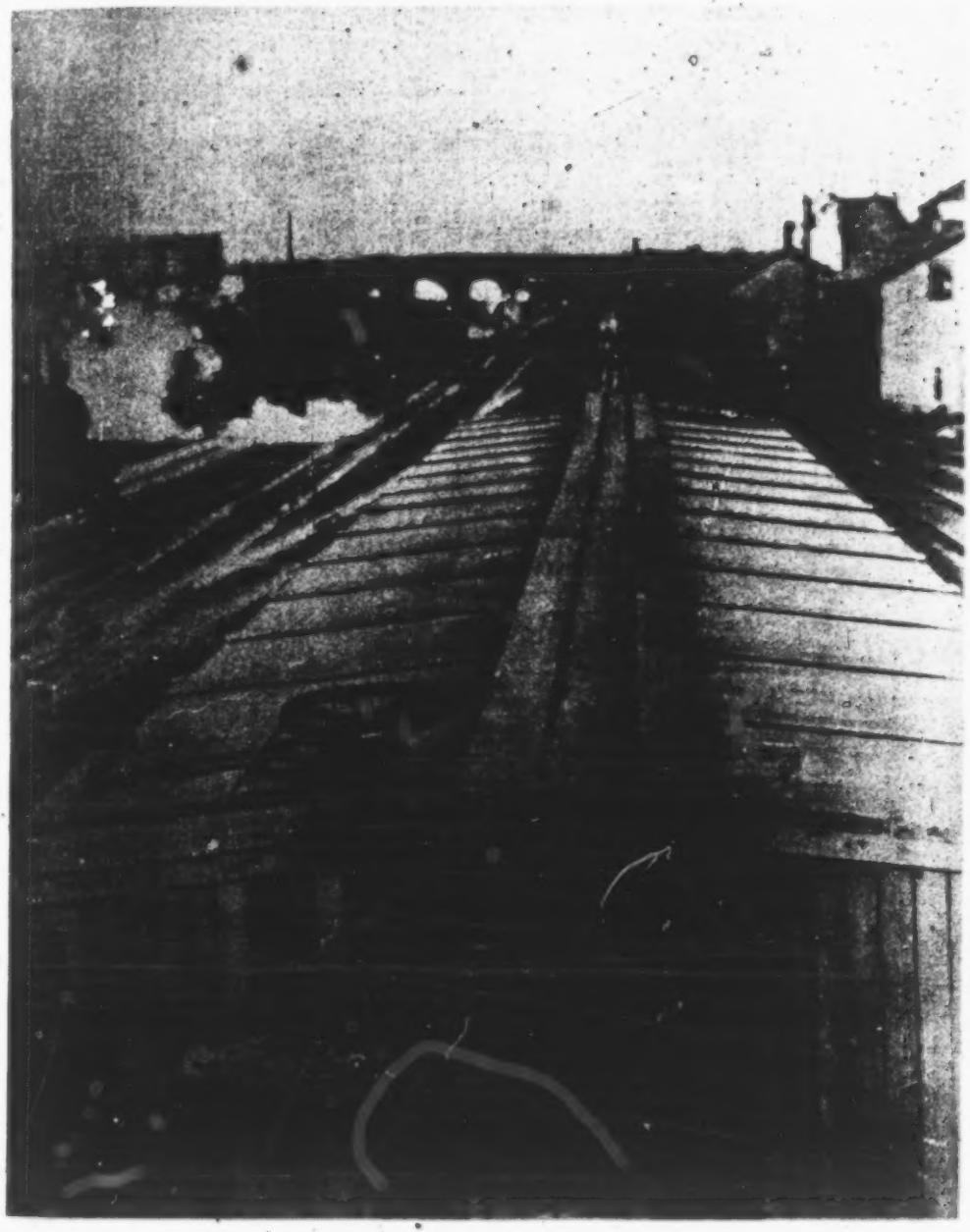
90 Defendant's Exhibit 24

91 Defendant's Exhibit 25



105-106

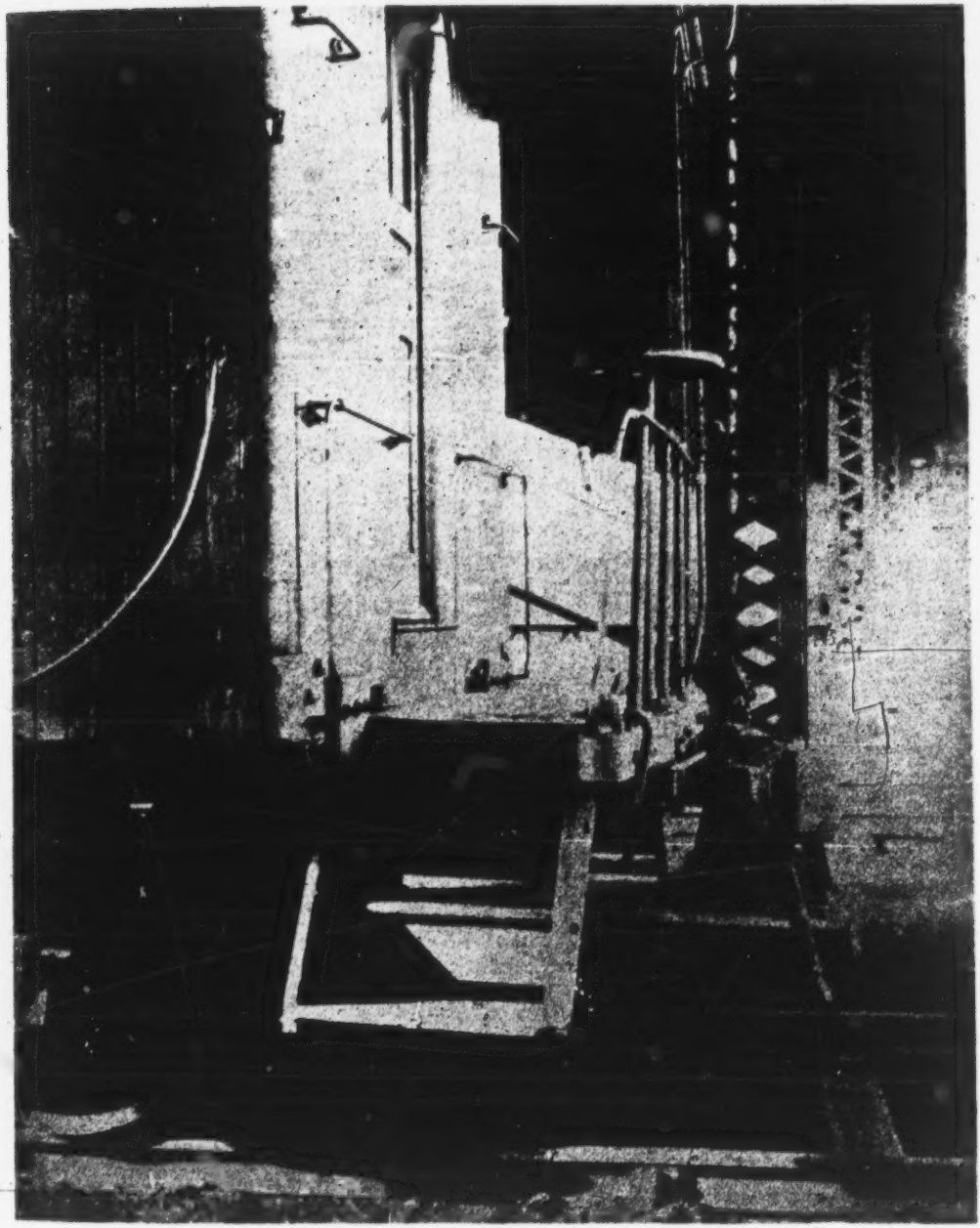
92 Defendant's Exhibit 27



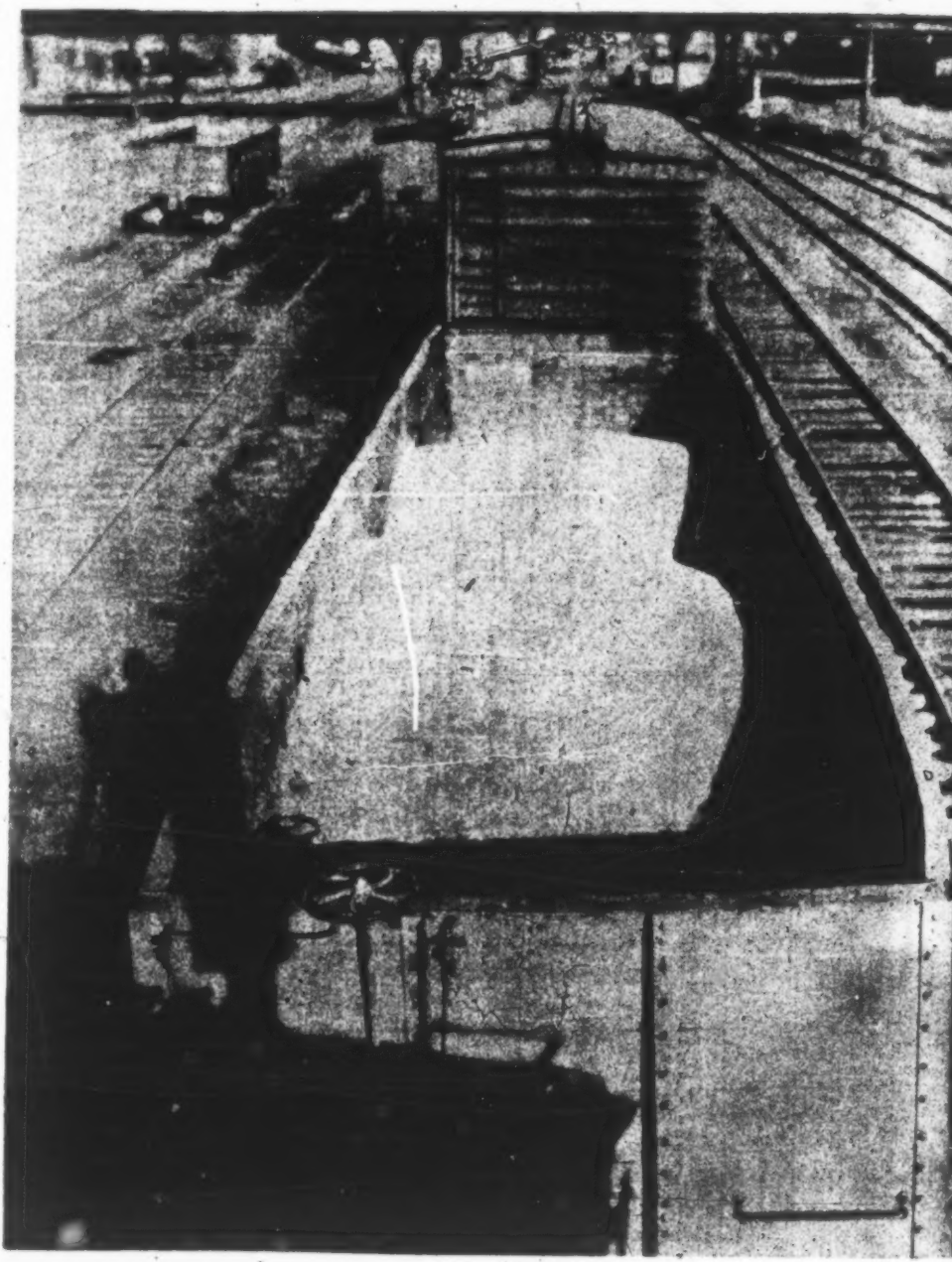
98
107-108

93 Defendant's Exhibit 28

94 Defendant's Exhibit 31



95 Defendant's Exhibit 32



[fol. 113] IN UNITED STATES DISTRICT COURT

Present: Honorable Joseph W. Molyneaux, judge.

(Before Molyneaux, J.)

JUDGMENT—April 7, 1933

The above entitled cause coming on this day for further trial to the court and jury, and the jury being called, and all being present, the following proceedings are had:

The jury is temporarily excused.

The argument of said motion for a directed verdict for the defendant is resumed and concluded; and is duly submitted to the court; and the jury is re-called.

And it is by the court

Ordered: That said defendant's motion for a directed verdict be and the same is hereby granted; and the jury renders its verdict herein as follows:

"We, the jury in the above entitled cause, by direction of the court, find for the defendant. Dated this 7th day of April, 1933. Gust Dollerschel, foreman."

Whereupon, pursuant to said verdict, it is by the court

Considered, ordered and adjudged, that said plaintiff, G. D. Swinson, do have and recover nothing from said defendant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, by reason of this, his action against said defendant, that said defendant do go hence without day, and that said defendant do have and recover of and from said plaintiff its costs and disbursements in this behalf expended, to be taxed, and do have execution therefor.

Further Ordered: That all further proceedings herein, except the taxation of costs and entry of judgment therefor, be and they are hereby stayed for a period of forty-two (42) days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Rule XXI of this court.

In United States District Court

Order Allowing Appeal—Filed June 12, 1933

Upon reading and filing the petition for appeal and assignment of error herein,

It is hereby ordered, that the appeal of the plaintiff, G. D. Swinson, from the judgment in favor of the defend-
[fol. 114] ant, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and against the plaintiff entered in this court on the 7th day of April, 1933, is hereby allowed as prayed for this 12th day of June, 1933.

Joseph W. Molyneaux, United States District Judge.

In United States District Court

Petition for Appeal

Now comes G. D. Swinson, the plaintiff in the above entitled action, and says that on the 7th day of April, 1933, this court entered judgment in favor of defendant and against the plaintiff, of no cause of action, and a judgment that plaintiff have and recover nothing against defendant, and that defendant have judgment for his costs and disbursements herein.

That in said judgment and in the proceedings in said cause had prior thereto, certain errors were committed to the prejudice of this plaintiff, which errors more fully appear in detail from the assignment of error annexed to this petition and filed herewith.

Wherefore, this plaintiff prays that an appeal may be allowed in his behalf, returnable to the United States Circuit Court of Appeals for the Eighth Circuit of the United States, for the correction of the errors so complained of, and that all necessary records, papers and proceedings in this cause duly authenticated may be sent to said Circuit Court of Appeals and that the judgment aforesaid be reversed.

Dated this 10th day of June, 1933.

Tom Davis, Ernest A. Michel and Carl L. Yaeger, Attorneys for Plaintiff, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

In United States District Court

Assignment of Error

Now comes G. D. Swinson, the above named plaintiff, and with his petition for appeal hereto affixed, files his assignment of error, which he avers occurred in the entry of the judgment in the above entitled cause and in the proceedings prior thereto, to-wit:

That the United States District Court erred in granting the motion of the defendant, Chicago, St. Paul, Minneapolis [fols. 115 & 116] & Omaha Railway Company, for a directed verdict in favor of the defendant and against the plaintiff in this action, and in permitting judgment to be entered on such directed verdict in favor of the defendant and against the plaintiff, for the reason that the evidence disclosed that the defendant had violated certain provisions of the Safety Appliance Acts of the United States, and that such violation was the proximate cause of injuries sustained by plaintiff while he was in defendant's employ, more specifically, it further appearing from the evidence that plaintiff had, in the usual, customary and ordinary manner of doing his work, used, worked on, around and about a certain grabiron on one of defendant's railway cars and that while he was so using said grabiron the same and the running board of said railway car to which said grabiron was attached did break, give way and come loose, by reason of all of which facts plaintiff sustained the injuries alleged in his complaint.

Wherefore, plaintiff prays that the judgment entered against him in this action, for the manifest error above specified, and the other and manifest errors in the records and proceedings herein, may be reversed and held for naught, and the plaintiff be granted a new trial of this cause.

Tom Davis, Ernest A. Michel and Carl L. Yaeger, Attorneys for Plaintiff, 419 Metropolitan Bank Bldg., Minneapolies, Minnesota.

Bond on appeal for $500.00, approved and filed July 1, 1933, omitted in printing.

[fol. 117] Citation, in usual form, showing service on William T. Faricy et al., Filed June 30, 1933, omitted in printing.

[fol. 118] In United States District Court

Order Enlarging Time under Citation—Filed July 19, 1933

For good cause shown, I do enlarge the time within which the plaintiff may docket said action on appeal to the United States Circuit Court of Appeals for the Eighth Circuit and file the record thereof with the clerk of said United States Circuit Court of Appeals so that said action may be so docketed and the record thereof so filed by or before the 15th day of September, 1933.

Dated this 19th day of July, 1933.

Joseph W. Molyneaux, United States District Judge.

In United States District Court

Order Enlarging Time under Citation—Filed Sept. 15, 1933

For good cause shown, I do extend the time for serving and filing the bill of exceptions in the above and foregoing matter to the 15th day of November, 1933, and I do enlarge the time within which the plaintiff may docket said action on appeal to the United States Circuit Court of Appeals for the Eighth Circuit and file the record thereof with the clerk of said United States Circuit Court of Appeals so that said action may be so docketed and the record thereof so filed by or before the 15th day of November, 1933.

Dated this 15th day of September, 1933.

Joseph W. Molyneaux, United States District Judge.

In United States District Court

Order Enlarging Time under Citation—Filed November 13, 1933

For good cause shown, I do extend the time for serving and filing the bill of exceptions in the above and foregoing

matter to the 15th day of January, 1934, and I do enlarge the time within which the plaintiff may docket said action on appeal to the United States Circuit Court of Appeals for the Eighth Circuit and file the record thereof with the clerk of said United States Circuit Court of Appeals so that said action may be so docketed and the record thereof so filed by or before the 15th day of January, 1934.

Dated this 13th day of November, 1933.

Joseph W. Molyneaux, United States District Judge.

[fol. 119] IN UNITED STATES DISTRICT COURT

ORDER ENLARGING TIME UNDER CITATION—Filed Jan. 13, 1934

For good cause shown, I do extend the time for serving and filing the bill of exceptions in the above and foregoing matter to the 1st day of March, 1934, and I do enlarge the time within which the plaintiff may docket said action on appeal to the United States Circuit Court of Appeals for the Eighth Circuit and file the record thereof with the clerk of said United States Circuit Court of Appeals so that said action may be docketed and the record thereof so filed by or before the 1st day of March, 1934.

Dated this 13th day of January, 1934.

Joseph W. Molyneaux, United States District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATED PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL —Filed Feb. 23, 1934

To the Clerk of the above named Court:

Please make a return to the United States Circuit Court of Appeals in the above entitled cause, and include therein:

1st. Complaint.
2nd. Answer.
3rd. Order transferring case to Fourth Division.
4th. Petition for appeal.
5th. Order allowing appeal.

6th. Assignment of errors.
7th. Bond on appeal.
8th. Citation.
9th. Order enlarging time under citation.
10th. Order enlarging time under citation.
11th. Order enlarging time under citation.
12th. Order enlarging time under citation.
13th. Bill of exceptions.
14th. Stipulation for allowing bill of exceptions and order allowing the same.
15th. Præcipe for transcript.
16th. Plaintiff's Exhibit A, and Defendant's Exhibits 8, 9, 10, 11, 12 13, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 27, 28, 31 and 32.
17th. Judgment.
18th. Stipulation and order as to physical exhibit.

[fol. 120] And said plaintiff hereby elects to print the record on appeal herein under the provisions of the Act of February 13, 1911.

Dated this 20th day of February, 1934.

Tom Davis, Ernest A. Michel and Carl L. Yaeger,
Attorneys for Plaintiff.

The foregoing præcipe for transcript is hereby approved.

William T. Faricy, Warren Newcome and Alfred Rietz, Attorneys for Defendant.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 121] Appearances of counsel omitted in printing.

[fol. 122] Order of Submission, June 8, 1934, omitted in printing.

[fol. 123] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9965. MAY TERM, A. D. 1934

G. D. SWINSON, Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Appellee

Appeal from the District Court of the United States for the District of Minnesota

Mr. Ernest A. Michel (Mr. Tom Davis and Mr. Carl L. Yaeger were with him on the brief), for appellant.

Mr. Warren Newcome (Mr. William T. Faricy and Mr. Alfred E. Rietz were with him on the brief), for appellee.

Before Gardner and Sanborn, Circuit Judges and Dewey, District Judge.

OPINION—August 1, 1934

Sanborn, Circuit Judge, delivered the opinion of the Court:

The parties will be referred to as in the court below. Swinson brought this action under the Federal Employers' Liability Act (Act of April 22, 1908, c. 149, 35 Stat. 66; 45 U. S. C. §53) to recover for personal injuries, alleging a violation of the provisions of the Safety Appliance Acts relating to handholds (Act of March 2, 1893, c. 196, §4, 27 Stat. 531; 45 U. S. C. §4) and running boards (Act of April 14, [fol. 124] 1910, c. 160, §2, 36 Stat. 298; 45 U. S. C. §11). The defendant denied liability. Upon the trial at the close of the evidence, the court directed a verdict for the defendant, and from the judgment entered thereon this appeal is taken.

The plaintiff's evidence tended to show that, at the time of the accident, he was a freight brakeman employed by the defendant and engaged in interstate commerce; that the accident occurred on September 17, 1932, at about nine o'clock P. M., at Mitchell, South Dakota; that he was releasing a tight brake at the west end of a tank car which was

in a train moving slowly westward; that the tank car was equipped with running boards 11 inches wide, which extended around the sides and ends of the tank; that the brake which he was releasing was in the middle of the end running board—that is, equidistant from its east and west edges—and about 34 inches from its north edge, the board being 9 feet long and 1¾ inches thick; that the car was equipped with end handholds which were bolted to the under side of the end running board and extended horizontally or outwardly; that one of the handholds was near the north end of the west edge of the running board, and 1¾ inches, or the thickness of the board, below its upper surface; that in releasing the brake the plaintiff placed his left foot on the running board adjacent to the pawl of the brake, and his right foot upon this handhold, which was 18 or 20 inches long and extended 2½ to 4 inches beyond the edge of the board; that he exerted pressure in releasing the brake; that as the brake released, the bolt, which held the outer or north end of the handhold to the running board, pulled through the board, causing him to fall to the track; that after the accident the wood of the board where the bolt had pulled through looked old, decayed, and was split; that it was customary for brakemen to place their feet on handholds of this type when releasing brakes, and to use such handholds for steps in going from one car to another.

The defendant's evidence tended to show that the handhold in question was a rounded iron bar about ⅝ of an inch in diameter; that it extended about 2¾ inches beyond the edge of the board; that the most northerly bolt hole was 2¼ inches from the north edge of the board, and both bolt holes were 1¾ inches from the west edge of the board; that it was 42 inches from the ground to the surface of the run-
[fol. 125] ning board; that these end handholds were no part of any ladder or steps leading from near the ground to the running board; that they were intended to be used and were used as handholds and only for the protection of employees going between the ends of cars; that, under the order of the Interstate Commerce Commission, they could extend either horizontally or vertically; that about 90 per cent of such cars were equipped with those extending vertically; that when the handholds extended vertically from the running board, they could not be used as footholds or foot braces in setting or releasing brakes; that it was not usual or cus-

tomary for trainmen to use them for any purpose except as handholds.

It is, of course, conceded that the defendant was under the absolute duty of maintaining this handhold in a secure condition for the purpose for which it was intended, and that any employee who, while using it for its intended purpose, was injured as a result of its being defective for that purpose, could recover. It is contended, however, that since Swinson was using this handhold as a foothold, foot rest or foot brace, the defendant owed him no duty to furnish him a handhold sufficient for that purpose or any handhold at all, and that he was in no better position in using a defective handhold for a foothold than he would have been in had there been no handhold and had he been injured in groping for a nonexistent handhold with his right foot. It is also contended that there was no evidence that there was any violation of the Safety Appliance Acts, since proof that the handhold was insufficient as a foothold did not establish that it was not secure for the purpose for which it was intended.

It would, of course, be true that if the defendant furnished and maintained a handhold adequate for its intended purpose, it was not guilty of any violation of the Safety Appliance Act. Erie R. Co. v. Lindquist, (C. C. A. 3), 27 Fed. (2d) 98; Lehigh & N. E. R. v. Smale, (C. C. A. 3), 19 Fed. (2d) 67; Ford v. New York, N. H. & H. R. Co., (C. C. A. 2), 54 Fed. (2d) 342, 343. Hence, if the pulling out of the handhold was due to no inadequacy for its intended purpose, but solely to its inadequancy for a use not intended, there would be no breach of duty upon which to base a claim of liability. However, we are of the opinion that there was sufficient circumstantial evidence as to the [fol. 126] strain to which it was subjected and the condition of the board after the accident to justify the conclusion that the handhold was defective for the purpose for which it was intended. We are convinced, however, that this handhold was not intended for use in the way it was used by Swinson, nor was it suitable for such use, nor was the defendant required to anticipate that it would be so used. Swinson seems to have demonstrated that it was physically possible to use the handhold in that way, but, at best, it obviously would furnish an insecure foothold or foot brace to a man with his feet spread some thirty inches apart and struggling to release a tight brake on a moving train.

We think this case must be dealt with on the basis that the handhold was defective as a handhold, that its giving way caused Swinson to fall, but that, at the time he was using it, he was using it in a way and for a purpose for which it was not intended or required, and that the accident was not one which might reasonably be expected to happen from a failure to furnish or to maintain a secure end handhold.

The court below was of the opinion that, under such circumstances, Swinson could not recover. The plaintiff contends that, having shown a violation of the provision of the Safety Appliance Act relating to handfolds (the violation of the provision relating to running boards is not now urged), and having shown that it was the giving way of the defective handhold which caused his injury, the violation must be regarded as the proximate cause of the injury, and that therefore he can recover.

We do not find that the precise question has been decided by the Supreme Court, and, until it is, there is bound to be some uncertainty as to the correct rule to apply to this situation. See dissenting opinion in Lang, Admx., v. New York Central R. Co., 255 U. S. 455, 461.

We know that a violation of the Safety Appliance Acts imposed an absolute liability upon the defendant in favor of any one of the class for whose benefit these statutes were enacted and who was injured as a result of such violation. St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor, Admx., 210 U. S. 281, 295; Chicago, B. & Q. Ry. Co. v. [fol. 127] United States, 220 U. S. 599, 570; Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33; Louisville & Nashville R. Co. v. Layton, 243 U. S. 617, 620, 621; Davis v. Wolfe, 263 U. S. 239; Lehigh Valley R. Co. v. Beltz, (C. C. A. 2), 10 Fed. (2d) 74; Ford v. N. Y., N. H. & H. R. Co., (C. C. A. 2), supra, 54 Fed. (2d) 342, 343; The Fairport, Painesville & Eastern R. Co. v. Meredith, — U. S. —, (opinion filed June 4, 1934), 54 S. Ct. 826, 828.

We also know that to support recovery there must be a causal relation between the violation and the injury. Lang, Admx., v. New York Central R. Co., supra, 255 U. S. 455, 459; Davis v. Wolfe, supra, 263 U. S. 239, 243.

In order to recover, therefore, it was necessary that Swinson prove, in addition to a violation of a provision of the Safety Appliance Acts, that such violation was the

proximate cause of his injuries, and that he was one of the class for whose benefit the statutes were enacted.

Section 4 of the Act of March 2, 1893, c. 196, 27 Stat. 531, provides: "That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

The fact that Swinson was not engaged in a coupling operation at the time he was injured is not controlling on the question of whether he was within the class for whose benefit the law was enacted. Louisville & Nashville R. Co. v. Layton, supra, 243 U. S. 617; Minneapolis & St. Louis R. Co. v. Gotschall, 244 U. S. 66; Davis v. Wolfe, supra, 263 U. S. 239; The Fairport, Painesville & Eastern R. Co. v. Meredith, supra, — U. S. —, 54 S. Ct. 826. If he had been using the handhold as a handhold, although for a purpose not connected with the coupling or uncoupling of cars, he could have recovered if injured because of its defects, under the rule announced in Davis v. Wolfe, supra; but the defendant owed him no duty, under the Safety Appliance Act, to furnish either a secure handhold or any handhold at all to be used as a foot brace. It was not required to anticipate that any such use would be made of the appliance, and, by using it in a manner not intended or con- [fol. 128] templated, he placed himself in a class for whose benefit the law was not enacted, and, under the circumstances, the delinquency of the defendant was not the proximate cause of his injury.

These conclusions, we think, are supported by the case of St. Louis & San Francisco R. Co. v. Conarty, Admx., 238 U. S. 243; Lang, Admx. v. New York Central R. Co., supra, 255 U. S. 455, and by the reasoning in Davis v. Wolfe, supra, 263 U. S. 239. The Conarty Case and the Lang Case both dealt with deaths resulting from accidental collisions with "bad order" cars lacking drawbars and couplers. The presence of drawbars and couplers would have prevented the injuries, but their absence did not cause the collisions. It was held that there could be no recovery, because the men killed were not within the class of persons for whose benefit the Safety Appliance Acts re-

quired that the cars be equipped with automatic couplers and with drawbars of the standard height; that their injuries were not "within the evil against which the provisions for such appliances are directed"; that it could not be claimed that the collisions were proximately attributable to a violation of the provisions of the Act, but only that, had they been complied with, there would have been no injuries; that couplers were not "intended to provide a place of safety between colliding cars."

The decision in the Lang Case was subsequent to that in the Layton Case, where the evidence was that Layton had been thrown off a string of box cars due to a collision resulting from the failure of an automatic coupler, and also the Gotschall Case, where a brakeman was killed by the opening of a coupler and the consequent setting of the brakes. Although in neither case was the injured man engaged in a coupling operation, it was held that the failure of the appliance was the proximate cause of the injury, and that these men were of the class entitled to the benefits of the Act, and that the rule of the Conarty Case did not apply. In the Layton Case, the Court said (page 621 of 243 U. S.):

"The language of the acts [Safety Appliance Acts] and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law springs from its being made unlawful to use cars not [fol. 129] equipped as required—not from the position the employee may be in or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these safety appliance laws is the proximate cause of injury to them when engaged in the discharge of duty."

It is this language which the plaintiff strongly relies on here, but it will be noted that it did not prevent the rule announced in the Conarty Case being applied to the Lang Case.

Davis v. Wolfe, supra, was the case of a conductor who was standing on the side of a car with his feet on a sill-step and holding to a grabiron with his right hand. The grabiron was loose. He signalled for a stop. Instead, the train

moved forward with a jerk, and, by reason of the loose grabiron, he fell and was injured. The same contention was made in that case as is made here, namely, that Wolfe was not in a situation where the defective grabiron operated as a breach of duty imposed for his benefit under Section 4 of the Act, which required grabirons on behalf of the employees engaged in coupling or uncoupling cars or in service connected therewith. The court reviewed the Conatry Case, the Layton Case, the Gotschall Case and the Lang Case, and said (page 243 of 263 U. S.):

"The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and on the other hand, he can recover if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

It was held that Wolfe could recover.

It will be noted that in the Davis Case, the Layton Case, and the Gotschall Case, the appliances failed to function in the manner and for the purpose intended. In the Conarty [fol. 130] Case and the Lang Case they failed to function when relied upon for a purpose for which they were not intended or required, namely, to prevent collisions between cars or to provide a place of safety between cars. In the cases where the appliances were relied upon and failed to perform their intended function it was held that the violation of the Safety Appliance Acts was the proximate cause of the injury, while in those cases where the appliances were relied upon to perform a function for which they were not intended, it was held—to use the language of the Davis Case—that they merely created "an incidental condition or situation in which the accident, otherwise caused," resulted in injury.

This, we think, is due to the fact that in the Conarty Case and the Lang Case it was not to be anticipated that a viola-

tion of the Act would produce the result complained of, nor was the result the natural or probable consequence of the violation.

In Milwaukee & St. Paul Ry. Co. v. Kellogg, 94 U. S. 469, 475, the court said: "But it is generally held, that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.

Where a safety appliance fails to perform a function which it is intended to perform, and where such failure directly causes injury to a trainman engaged in the performance of his duties, as in the Layton Case, the Gotschall Case and the Davis Case, the failure of the railroad company to comply with the Act is clearly the proximate cause of the injury, but, where an appliance is used or relied upon for a purpose and function not intended, and its failure causes injury, it cannot be said to be the proximate cause of the injury, because the injury is not the natural, probable and foreseeable consequence of the failure to comply with the law. So in this case, while the giving way of the handhold resulted in Swinson's injuries, the failure of the defendant to comply with the provisions of the law cannot be said to be the proximate cause of those injuries which resulted from the unexpected and unintended use which was made of the handhold, nor was Swinson, under the circumstances, one of the class for whose benefit the law was [fol. 131] enacted or to whom the duty of complying with it was owed, since his injuries were not "within the evil against which the provisions for such appliances are directed."

Our conclusion is that the court below was right in directing a verdict. The judgment is

Affirmed.

[fol. 132] IN UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

No. 9965

G. D. SWINSON, Appellant,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY

JUDGMENT—August 2, 1934

Appeal from the District Court of the United States for the District of Minnesota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, St. Paul, Minneapolis and Omaha Railway Company have and recover against G. D. Swinson the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 22, 1934.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,011. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 383. G. D. Swinson, petitioner, vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed September 15, 1934. File No. 383, O. T., 1934.

(5652-C)

FILE COPY

FILE
SEP 15
CHARLES ELMORE

No. 383

Supreme Court of the United States

OCTOBER TERM, 1934.

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TOM DAVIS,
ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

INDEX.

	Page
Petition	1
As to Running Boards	2
Grabiron—Handhold Statute	2
Brief Summary of Facts Involved	3
Reasons Relied on for the Allowance of the Writ	5
Brief in Support of Petition	11
Question Presented Never Directly Decided	11
Duty Under Safety Appliance Acts Absolute	12
Within the Class	12
Act Liberally Construed	13
Not the Intention but the Use	17
Use to Which Instrumentality Put	19
The Lang and Conarty Cases	20
The Intention of Congress	20
Errors of Circuit Court	22
The General Rule	26
Conclusion	26

TABLE OF CASES.

Chesapeake & Ohio R. Co. vs. Smith, 42 Fed. (2d) 111	19
Chicago, Milwaukee Ry. Co. vs. Kellogg, 94 U. S. 469	7, 25
Clapper vs. Dickinson, 137 Minn. 415, 163 N. W. 752	15
Davis vs. Wolfe, 263 U. S. 239, 68 L. Ed. 284	6, 7, 11, 18, 20, 25
The Fairport, Paynesville & Eastern Ry. Co. vs. Meredith, 54 S. Ct. 826	11, 19
Frye vs. Chicago, Rock Island & Pacific Ry. Co., 157 Minn. 52, 195 N. W. 629	22
Lang vs. New York Central Ry. Co., 255 U. S. 460, 65 L. Ed. 731	6, 20
Lehigh Valley R. Co. vs. Howell, 6 Fed. (2d) 784	19, 21
Louisville & Nashville Ry. Co. vs. Layton, 243 U. S. 617, 61 L. Ed. 931	6, 11, 16, 20
McNaney vs. Chicago, R. I. & P. R. Co., 132 Minn. 391, 157 N. W. 650	14, 21
Minneapolis & St. Louis Ry. Co. vs. Gottschall, 244 U. S. 66	11
Roberts Federal Liability of Carriers, 2d Edition, Volume 2, pages 1358-1359	14, 26
St. Louis and San Francisco Ry. Co. vs. Conarty, 238 U. S. 248, 59 L. Ed. 1290	6, 20

Supreme Court of the United States

OCTOBER TERM, 1934.

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Comes now G. D. Swinson, the above named petitioner, and respectfully shows to this court:

1st: That the only question involved in this case is whether a railway employee can recover if he is injured because of the giving way of a grabiron at the end of a railway tank car when plaintiff had his foot thereon, the railroad company admitting that there would be liability if he had his hand on the grabiron, but claiming there would be none when he had his foot thereon.

2nd: That heretofore petitioner commenced, and there was tried in the United States District Court, District of Minnesota, Fourth Division, an action under the Federal Employers' Liability Law against the respondent, wherein plaintiff sought to recover damages from respondent because

of a crushed foot, which was caused by the violation, by the railway company, of the Safety Appliance Acts of the United States pertaining to grabirons and running boards, these acts providing:

AS TO RUNNING BOARDS.

"All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and *secure running boards* shall be equipped with *such* ladders and *running boards*."

Act of April 14, 1910, Ch. 160, Sec. 2, 36 Stat. 298, Title 45, Sec. 11.

The defendant, under the facts in this case, violated the statute both as to running boards and as to ladders and handholds. The complaint alleged that the defendant "did have upon said railway tank car a *running board, ladder and handhold* which were rotten, loose, broken, defective and insecure."

GRABIRON—HANDHOLD STATUTE.

The original Safety Appliance Act, being the Act of March 2nd, 1893, provides as follows:

"It shall be unlawful for any railroad company to use any car in Interstate Commerce that is not provided *with secure grabirons or handholds* in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

3rd: That at the close of the trial of said action the court directed a verdict in favor of defendant; that an appeal was taken to the Circuit Court of Appeals of the Eighth Circuit, which court sustained the lower court; that judg-

ment was entered in the Circuit Court of Appeals on the 2nd day of August, 1934, and that it is to review such judgment that this petition is presented.

4th: That said judgment of the Circuit Court of Appeals is final, and that the same is erroneous, and that this Honorable Court should require this cause to be certified to it for review and determination pursuant to law.

5th: That the claim of petitioner was founded on the Federal Employers' Liability Law, it being conceded that petitioner and respondent were, at the time petitioner was injured, engaged in Interstate Commerce; that the right of recovery of petitioner was further based upon the Safety Appliance Acts of Congress, heretofore quoted.

BRIEF SUMMARY OF FACTS INVOLVED.

Swinson was a brakeman. He was working about a railway oil tank car. This car was surrounded by a platform, upon which employees might work, and walk and be about, as necessity required. On the 17th day of September, 1932, at Mitchell, South Dakota, petitioner was attempting to release a brake which had been tightly set on this oil tank car (R. 5-6).

At the end of the car, and projecting horizontally, was a metal grabiron. This was near the center of the car, as was the brake. The grabiron, or handhold, was from eighteen to twenty inches long, was fastened to the running board, and extended out horizontally from two and one-half to four inches beyond the running board (R. 10).

Petitioner could not release the brake, which was tightly set, without getting a "purchase," which he did, by placing his foot on the grabiron. This he did, in attempting to re-

lease the brake, and when he stepped upon the grabiron, one end of the same pulled through the running board, gave way, and threw him to the rails, causing a crushing of his foot, which was later amputated (R. 6-7).

The petitioner claimed that an absolute duty rested upon the railway company to maintain this grabiron and running board in a secure condition.

It is *undisputed* that the grabiron did give way, and did pull out of the running board and that petitioner was injured because of this.

The railroad company, respondent, claimed that because petitioner put his *foot* on the grabiron instead of his *hand*, that he could not recover, and that he was not "within the *class*" for whose benefit the statute was enacted, although he was a *railway brakeman*.

The trial court accepted this view and directed a verdict against petitioner.

Petitioner, in the trial court, showed, by *nine* witnesses, that the use to which the appliance was put, was one of the *ordinary, normal* and *customary uses* thereof. Petitioner showed that placing the foot on the appliance was common, was customarily done in various railroad yards, and by various railroad employees, and that plaintiff was within the class intended to be protected by the statutes.

Respondent introduced evidence tending to show that this was not the fact.

The Circuit Court of Appeals of the Eighth Circuit upheld the trial court on the theory that petitioner could not recover because he put his *foot* on the instrumentality, although he could have recovered had it given way when he had his *hand* thereon.

The Circuit Court said:

> "We do not find that the precise question *has been decided by the Supreme Court,* and *until it is,* there is bound to be some *uncertainty* as to the correct rule to apply to this situation."

The absolute requirements of the Safety Appliance Acts as to grabirons, handholds and running boards necessitated maintaining the same in a safe and secure condition. The use to which the same was put was a customary and common use, and the Safety Appliance Acts were applicable. Because of their violation petitioner was injured, such violation being a proximate cause of the injury.

That a more complete statement of the facts, and the action of the Circuit Court of Appeals, to review whose judgment this petition is made, appears in the brief in support of this petition, which is hereto annexed.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The writ of certiorari should be granted in this case for the following reasons:

1st: The decision of the Circuit Court of Appeals is erroneous.

2nd: The Circuit Court of Appeals said:

> "We do not find that the precise question has been decided by the Supreme Court, and, until it is, *there is bound to be some uncertainty as to the correct rule* to apply to this situation."

3rd: The decision of the Circuit Court of Appeals is inconsistent with the decisions of other Circuit Courts of

Appeal and is inconsistent with the decisions of the Supreme Court of the United States in *Louisville & Nashville R. R. Co. vs. Layton*, 243 U. S. 617, 61 L. Ed. 931 and *Davis vs. Wolfe*, 263 U. S. 239, 68 L. Ed. 284.

4th: The Circuit Court of Appeals misconstrued the Safety Appliance Acts and held applicable the cases of *Lang vs. New York Central Ry. Co.*; 255 U. S. 460, 65 L. Ed. 731 and *St. Louis and San Francisco Ry. Co. vs. Conarty*, 238 U. S. 248, 59 L. Ed. 1290, when the controlling rule was laid down in *Davis vs. Wolfe*, 263 U. S. 239.

5th: The Circuit Court of Appeals erred in holding that petitioner was "not within the class" intended to be protected by the Safety Appliance Acts. The class intended to be protected consisted of brakemen, switchmen, conductors and men working about railway cars. Swinson *was* a brakeman. He was within the class. The nearest thing to a justification of the position of the Circuit Court of Appeals would be a statement that while petitioner was within the class intended to be protected, he "stepped out of character" when he had his foot on the grabiron instead of his hand.

6th: The Circuit Court of Appeals erred when, in its opinion with reference to the grabiron, it said:

> "We are convinced, however, that this handhold was not intended for use in the way it was used by Swinson, nor was it suitable for such use, nor was the defendant required to anticipate that it would be so used."

This is not correct because nine witnesses testified for petitioner that the grabiron, as he used it, was used in one of the ordinary, usual and customary ways in which such grabirons are used in railroad service.

There was no evidence tending to show what use Congress "intended" should be made of the handhold.

7th: The Circuit Court was in error in thus holding:

> "We think this case *must* be dealt with on the basis that *the handhold was defective* as a handhold, that its giving way *caused Swinson to fall,* but that, at the time he was using it, he was using it in a way and for a purpose for which it was not intended or required, and that the accident was not one which might reasonably be expected to happen from a *failure* to *furnish* or to *maintain a secure end handhold.*" The *statutes* do not *limit* the running board or grabiron to use by the hand.

8th: The Circuit Court was in error in holding:

> "It was not required to anticipate that any such use would be made of the appliance, and, by using it in a manner not intended or contemplated, he placed himself *in a class for whose benefit the law was not enacted,* and, under the circumstances, the delinquency of the defendant was *not the proximate cause* of his injury."

Such rule justifies having an insecure grabiron on the car,—a penalty defect.

The court erred in this holding because it appeared from the evidence by nine witnesses that the use made of the grabiron was one of the *ordinary* and *customary* uses.

9th: The Circuit Court erred in failing to apply the doctrine of *Davis vs. Wolfe, supra.*

10th: The Circuit Court erred in holding that the case of *Chicago, Milwaukee Ry. Co. vs. Kellogg,* 94 U. S. 469, was authority for the granting of a directed verdict in this case, on the question of proximate cause, because the Kellogg

case holds that the question of proximate cause is to be determined by a jury.

11th: The Circuit Court erred in holding that the Safety Appliance Act as to grabirons had not been violated so as to give petitioner a right of recovery.

12th: The Circuit Court erred in holding that the Safety Appliance Act as to running boards had not been violated, so as to give petitioner a right of recovery.

13th: The Circuit Court erred in holding that even though the violation were proven, plaintiff, *a brakeman*, was "not within the class" intended to be protected by the Safety Appliance Statutes.

14th: The writ should be granted because the question involved is one of importance to thousands of railway employees in the country.

15th: The writ should be granted that the law might be settled, so that if petitioner's contention be wrong, legislation may be enacted to give protection to railway men injured by defective safety appliances while doing their work in the ordinary, usual and customary manner, as shown by the evidence of nine witnesses for petitioner.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Missouri, commanding that court to certify and send to this court, on a day to be designated, a full and complete transcript of the record and proceedings of the Circuit Court of Appeals in said cause, being No. 9965, and entitled *G. D. Swinson vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company,* and that said

judgment of the Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other relief in the premises as to the court may seem proper. And your petitioner will ever pray.

G. D. SWINSON,
Petitioner.

TOM DAVIS and
ERNEST A. MICHEL,
His Counsel.

Supreme Court of the United States

OCTOBER TERM, 1934.

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED NEVER DIRECTLY DECIDED.

Error was committed when Swinson was denied recovery because he had his foot on the grabiron when it gave way.

The claim of the railroad company was that Swinson had no right to put his foot on the grabiron; that there was no liability because he had his *foot* on the grabiron when it gave way, instead of his *hand.*

Decisions in point on principle, are, among others: *Louisville & Nashville Ry. Co. vs. Layton,* 243 U. S. 617; *Minneapolis & St. Louis Ry. Co. vs. Gottschall,* 244 U. S. 66; *Davis vs. Wolfe,* 263 U. S. 239 and *The Fairport, Paynesville & Eastern Ry. Co. vs. Meredith,* 54 S. Ct. 826.

Under the doctrine of these four cases, the decision of the Circuit Court of Appeals of the Eighth Circuit is wrong.

Duty Under Safety Appliance Acts Absolute.

It is not questioned that there is an absolute duty under the Safety Appliance Acts pertaining to grabirons or handholds and running boards. The statutes have been quoted in the petition, and in the interest of brevity, will not be quoted again.

The Circuit Court recognized the absolute duty devolving on the carrier, saying that it "was under the absolute duty of maintaining this handhold in a secure condition for the purpose for which it was intended, and that any employee who, while using it for its intended purpose, was injured as a result of its being defective for that purpose, could recover."

Within the Class.

But the Circuit Court said the petitioner was not within the class entitled to the benefits of the act. In this the court clearly erred.

The *class* intended to be benefited included railway brakemen. Petitioner *was* a railway brakeman. The most that could be said to sustain the contention of the court would be to say that although petitioner was within the class, that in the particular work being done at the time, he so conducted himself as to be removed from the protection intended for the "class."

It is erroneous to say that *brakemen* were *not* within the class intended to be protected by the Safety Appliance Acts.

Act Liberally Construed.

The grabiron act provides that cars should have secure grabirons "for greater security to men in *coupling or uncoupling* cars."

The carriers first contended that there could be no recovery unless men were *actually engaged in coupling operations.*

The general rule enunciated by the courts is that where a safety appliance fails to function or is defective and an employee is injured by reason thereof, he may recover although he was *not engaged in an operation in which the appliances were designed to furnish him protection.*

> "That there is no inconsistency between this conclusion and the repeated declarations of the Supreme Court in earlier cases to the effect that the evil sought to be remedied by the enactment of these statutory requirements as to coupling facilities was the risk of coupling and uncoupling, is at once apparent when it is considered that in such declarations the term, 'risk of coupling and uncoupling,' is used in a historical sense, and refers to those risks which existed prior to the use of the appliances required by the statutes and orders now in force. The protection afforded by these statutes, on the other hand is present and prospective. *The shield of the statute is raised over every employee who, in discharging duties in the course of his employment, although not engaged in an operation in which the safety appliances are specifically designed to give him protection, is put in peril by the failure of any such appliance, designed to eliminate or minimize the risks of coupling or uncoupling, to perform its appointed function.* He has the protection of the statute *whenever* a

breach of its terms occurs, and the risk of an injury consequent upon such breach is by virtue of the statute transferred from him to the carrier; but not until injury causally related to such breach occurs does the remedial force of the statute become effective."

Roberts Federal Liabilities of Carriers, 2nd Edition, Volume 2, pages 1358-1359.

In *McNaney vs. Chicago, R. I. & P. R. Co.,* 132 Minn. 391, 157 N. W. 650, plaintiff was injured when he attempted to board a caboose which had a loose grabiron. There was another issue of negligence submitted to the jury not here material. Judge Holt, who wrote the opinion in that case, stated the questions for consideration by the court to be the following:

"The main ground upon which defendant predicates the right to a new trial is (a) that the insecure grabiron which is claimed to have occasioned the fall is not one of the safety devices demanded by the Federal Safety Appliance Act, either as originally passed or as amended and supplemented and (b) that plaintiff, when injured, was not engaged in coupling, in the doing of which work, *and that alone,* the act assured to him the use of safe grabirons. If either contention be right a new trial is inevitable."

In this case the evidence did not show that the use of the handholds was confined "to having hold thereof while walking along the car to couple or uncouple."

After referring to the Safety Appliance Act of 1893 and the amendment of 1910, Justice Holt said:

"Taking the safety appliance acts as now in force, and giving them a construction which will secure to

men *in the extremely perilous work of brakemen* and switchmen the protection intended, we think it should be held that every handhold, step, ladder and running board designed for their support in the *necessary work of operating trains,* must be secure. That being the case, we deem the grabiron here involved covered by the acts mentioned."

Nine witnesses testified as to such "necessary work," saying the work and use of the grabiron by Swinson was usual and customary.

In *Clapper vs. Dickinson,* 137 Minn. 415, 163 N. W. 752, plaintiff was injured while attempting to place a block under a car to prevent its further movement. Because of a defective coupling appliance on another car which had failed to couple automatically by impact, the car about which Clapper was working and attempting to block was caused to be knocked onto and against him, injuring him. He claimed that the previous violation of the Safety Appliance Act caused his injury.

Chief Justice Brown wrote the opinion for the Supreme Court of Minnesota and said:

"The principal *claim* of defendant is that the defect in the coupler and its failure to work, even though the result of defendant's negligence *is not a matter of which plaintiff can complain.* This contention is based upon the rule of general application, that where a statute is enacted for the benefit and protection of a *particular class,* in order to complain of a violation thereof an injured party must bring himself *within that class.* And the precise point is, that since plaintiff at the time of his injury was not engaged in coupling the cars together, he is *not within the class* for whose protection

the Federal Act was intended, and cannot therefore complain of the defect. Authorities are cited in support of the point. *Johnson vs. Southern Pac. Co.,* 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *U. S. vs. Louisville & N. R. Co.,* 162 Fed. 185; *Hohenleitner vs. Southern Pac. Co.,* 177 Fed. 796; *Burho vs. Minneapolis & St. L. R. Co.,* 121 Minn. 326, 141 N. W. 300. Counsel for defendant presented the case in the court below *upon that theory of the law.* But since the trial of the action and since the preparation of their brief in this court, the Supreme Court, the final authority upon all questions as to the construction of the Federal Safety Appliance Act, *has put the question entirely at rest* by a decision adverse to the contention here made. *Louisville & N. R. Co. vs. Layton,* 243 U. S. 617, 37 Sup. Ct. 456, 61 L. Ed. 931. In that case the court held that an interstate railway carrier is liable in damages to an employee injured in the discharge of his duty, *regardless of the position he may have occupied at the moment he was injured,* where the carrier's failure to obey the automatic coupler requirements of the Federal Safety Appliance Acts is the proximate cause of his injury. In that case as in the case at bar the employee was not engaged in attempting to effect a coupling of the cars when injured, but the jury found in each that the defect in the coupling was the proximate cause of the injury. We, therefore, follow and apply the rule announced by the Layton case."

The opinion in the Minnesota case above cited follows the opinion of the Supreme Court of the United States in *Louisville & N. R. Co. vs. Layton,* 243 U. S. 617, wherein the court said:

"While it is undoubtedly true that the *immediate occasion* for passing the laws requiring automatic couplers was the great number of deaths and injuries caused to employees who were obliged to go between cars to couple and uncouple them, yet these laws as written *are by no means confined in their terms to the protection of employees only when so engaged.* The language of the acts and the authorities we have cited make it entirely clear that the liability in damages to employees for failure to comply with the law, springs from its being made unlawful to use cars not equipped as required —not from the position the employee may be in, or the work which he may be doing at the moment when he is injured. This effect can be given to the acts and their wise and humane purpose can be accomplished only by holding, as we do, that carriers are liable to employees in damages whenever the failure to obey these Safety Appliance Laws is the proximate cause of injury to them when engaged in the discharge of duty."

Not the Intention But the Use.

The Circuit Court of Appeals held that it was not *"intended"* that this grabiron should be used by the foot; that the *brakeman* was not "within the class" intended to be protected.

The grabiron was a heavy piece of iron, fastened onto a heavy oak plank, forming a part of the running board around the tank car.

If in condition—if the running board were not rotten, if the handhold or grabiron were not defective—it would be strong enough to stand the strain of many men thereon. The weight or strain from a man using his foot in operating

the brake would not be appreciably more than the strain placed upon the grabiron if a man should use it to swing himself over the draw bars and between the cars.

The Layton case, *supra*, settled the question of liability, but it was re-affirmed by this court in *Davis vs. Wolfe*, 263 U. S. 239, wherein it was said:

> "The rule clearly deducible from these four cases is that, on the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not *a* proximate cause of the accident which results in such injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, *he can recover* if the failure to comply with the requirements of the act is *a* proximate cause of the accident, resulting in injury to him while in the discharge of his duty, *although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection.*"

It will be noted that the court said that a failure to comply with the requirements gives a right of action, if the failure is *a* proximate cause of the accident.

In the case at bar there was a failure to comply with the requirements of the statutes. This failure injured petitioner. It was the proximate cause. It cannot be said it was not the proximate cause except by resorting to legal sophistry, because the grabiron pulled out of the rotten running board and this caused the injury to Swinson.

The Davis case lays down the rule but it was not followed by the Circuit Court.

That the Safety Appliance Acts are to be liberally construed and not restricted clearly appears from the recent

decision of this court in the case of *Fairport, Paynesville & Eastern Ry. Co. vs. Meredith*, 54 S. Ct. 826.

USE TO WHICH INSTRUMENTALITY PUT.

In *Lehigh Valley R. Co. vs. Howell*, 6 Fed. (2d) 784, it appeared that the servant took hold of a hand brake to assist him in climbing onto a car. The hand brake was defective and the servant was injured. He claimed a right to recover under the Safety Appliance Act but the railroad contended that the appliance was not being used *in the manner intended* and that, therefore, the case did not come within the Safety Appliance Statute.

The court, after referring to many cases, said:

> "If the brake was *incidentally used* in going to the point where the brake was to be released by turning the hand wheel, it was within the section. We think the defendant in error was entitled to invoke the Safety Appliance Act in imposing liability for the injury which he sustained under the circumstances here disclosed."

In *Chesapeake & Ohio R. Co. vs. Smith*, 42 Fed. (2d) 111, it appeared that a rear brakeman was riding a caboose. The head brakeman erroneously threw a wrong switch and as the cars proceeded down the wrong track, the air suddenly "went on." One car was found to be off center, three cars from the caboose. When the air "went on," plaintiff was thrown and injured. There was no evidence to show what made the brake go on. Plaintiff claimed a right of recovery under the Safety Appliance Act. A recovery was upheld by the Circuit Court of Appeals for the 6th Circuit, Mack, Circuit Judge, in the opinion, saying:

> "And, even though plaintiff, at the time of the acci-

dent, was not engaged in an operation in which the safety appliances are *specially designed to furnish protection*, the failure to comply with the acts *may nevertheless be the proximate cause of the injury. Louisville & Nashville R. R. vs. Layton*, 243 U. S. 617, 37 S. Ct. 456, 61 L. Ed. 931; *Davis vs. Wolfe*, 263 U S. 239, 44 S. Ct. 64, 68 L. Ed. 284. This issue was submitted to the jury under a proper charge"

The Lang and Conarty Cases.

The Lang case, 255 U. S. 460, and the Conarty case, 238 U. S. 248, have been relied upon by the carriers to defeat liability in many cases. These decisions are inconsistent with the *Layton*, 243 U. S. 617 and the *Davis vs. Wolfe* case, 263 U. S. 239. They were distinguished in the Davis case, but are still relied upon by carriers, although not here in point. These decisions have brought about much confusion and being inconsistent with the final authority, *Davis vs. Wolfe*, 263 U. S. 236, should be definitely overruled.

The Circuit Court applied the rule of the Lang case instead of the rule of the later Davis case.

The Intention of Congress.

The Circuit Court decided the present case on the theory that the Act of Congress was *not intended to protect brakemen* working as Swinson did.

Nine competent, experienced railroad men testified that the use plaintiff made of the grabiron was one of the usual, ordinary and customary uses to which the same was put.

There was no evidence as to what Congress intended in passing the act, save the general and inescapable inference

that Congress desired to protect the employees and the public. It is a certainty the act was not passed to protect employers.

Congress did not impose *any limitation* upon the applicability of the act, nor did the Supreme Court in the Layton and Davis cases.

Neither did the Circuit Court of Appeals of the Second Circuit impose such limitation in the Howell case, 6 Fed. (2nd) 784.

It was not imposed by the Supreme Court of Minnesota in *McNaney vs. C. R. I. & P. Ry. Co.,* 132 Minn. 391, 157 N. W. 650, which case has been frequently cited with approval by various Circuit Courts and by this court.

Railroad trains are made up of engines, box cars, tank cars, etc. Upon these trains are many appliances, grabirons, handholds, couplers, running boards, platforms, etc.

The use of these appliances has never been restricted nor limited.

When a railroad man goes between two box cars, he necessarily steps onto the draw-bar or coupling apparatus, and thus finishes his "jump across."

The coupling apparatus was not intended as a "stepping stone" for men going between cars, but it is customarily so used.

A brake staff is customarily used as a handhold, as shown in the Howell case, *supra.*

There is no rule of the Interstate Commerce Commission showing the intent or purpose, nor restricting the use of an end grabiron.

This end grabiron is made of substantially the same kind of iron, of the same size and strength, fastened with the same kind of bolts and nuts, attached in practically the same way as a side ladder or handhold.

There was no evidence tending to show that the strain upon this grabiron, because Swinson put his foot thereon was so great that, if in good condition, the grabiron could not stand it. As a matter of common knowledge, this grabiron, fastened onto this heavy oak plank, by the means disclosed in the evidence, would stand a strain much greater than it would be subjected to if a man stepped on it. If it were in good condition, it would not give way if a brakeman stepped on it. Furthermore, *he could not force it* to give way by any pressure he could exert thereon with his foot (Lush, 55).

The Minnesota Supreme Court in the Frye case took the position, in effect, contended for here.

See *Frye vs. Chicago, Rock Island & Pacific Ry. Co.*, 157 Minn. 52; 195 N. W. 629.

ERRORS OF CIRCUIT COURT.

The Circuit Court fell into the fundamental error of holding that the act did not intend protection to this brakeman.

It is not the intention, but it is *the use to which the appliance is put* which governs liability, under the Layton and Davis cases, and the other cases cited herein.

It must be remembered that nine men—practical railroad workers, testified that the use Swinson made of this grabiron, fastened to the rotten running board, was one of the *ordinary, usual and customary uses to which such appliances were put.*

The Circuit Court, in the opinion, said that if the handhold was inadequate "for its intended purpose" liability would follow.

Who determines the "intended purpose"?

Congress made no specification or direction. Congress said

the handhold, or grabiron and the running board, must be secure. It said nothing about intent.

While there was a limitation in the grabiron statute, "for greater security to men in coupling and uncoupling cars," this court held this limitation was not controlling.

It will be judicially assumed that handholds or grabirons on the sides of box cars are used by the men in climbing the cars; that they are used by both the hands and feet. If one of these grabirons gave way when a plaintiff had his foot thereon, liability would follow.

Liability could not be prevented by calling the grabiron a handhold, and saying the intention was only to protect employees when they had their hands on the grabiron and not when they had their feet thereon.

The same thing applies in the case at bar, where the nine witnesses testified as to the customary use of the appliance. The record does not show that such use has ever been prohibited.

The Circuit Court said that the handhold was not intended for use as Swinson used it. Nine witnesses said it was.

The witness Irwin said:

> "I have had occasion to switch and set brakes and release brakes on tank cars of this kind and type. I have seen hundreds, I believe, in my experience of cars similar to the car in question, where the handhold would be out horizontally. I have used this grabiron or foot step and it is customarily used to grab hold of one car and grab the other—swing yourself up on the drawbar and get over to the car; it is customarily used to step on and step over to the other car, because of the distance between the cars. It is customarily used to put your right foot on when you are letting off a brake

that is set rather tightly. Your left foot is put into position to operate the dog that catches the ratchet on the brake staff. I have seen other railroad men use this horizontal grabiron in releasing brakes."

Also the witness Lush said:

"The usual practice is for a man to step from the running board and lean over and take hold of the brake wheel with your right hand and step on the grabiron with your left foot and then take hold of the railing that runs around the top of the tank. There is nothing particularly dangerous about that and I have done it and seen it done by others thousands of times and have never heard of a man being injured doing it" (R. 54).

As to the use of the grabiron, the witness Murphy said:

"I have done it many times, and have seen other railroad men do it" (R. 57).

The witness McFarland said:

"I have seen this done hundreds of times" (R. 58).

The witness Williams said

"that if the brake was set tight, it would have to have more leverage to let it off so the only place you had was the grabiron; it has been the common practice to use it" (R. 58).

To the same effect is the testimony of all plaintiff's witnesses.

But it is not necessarily the *intended* use, as pointed out in the Layton and McNaney cases, but it is *the use to which the same was put.*

The Circuit Court says that the railroad company was not "required to anticipate that it would be so used."

The evidence shows, by the nine witnesses, that the use was an ordinary, usual and customary one, as did Swinson, so the company *actually knew it* and there was no question of "anticipation."

The Circuit Court further said this device would furnish an insecure foothold to a man setting a brake. There is no conclusive evidence of this, and the plaintiff, petitioner herein, testified that the use of the grabiron would give him a better and a more secure foothold.

The Circuit Court further said that "the handhold was defective as a handhold; that *its giving way caused Swinson to fall.*" (Certainly proximate cause.)

The court, however, said that he was not using it for the intended purpose.

It is to be noticed that the court said that the defective handhold "caused Swinson to fall." If this be so, the defect *was* the proximate cause of the accident, and under the Layton case, the Gottschall case and the *Davis vs. Wolfe* case, plaintiff was entitled to recover.

On the question of proximate cause, the Circuit Court cited the Kellogg case, 94 U. S. 469, but failed to quote therefrom that portion of the opinion which holds that proximate cause is practically always a question for the jury.

It cannot be properly said that when an appliance upon which an employee steps gives way because of a defect, such defect is not the proximate cause of the accident.

The Circuit Court said the running board statute was not urged. It was set forth in appellant's brief, and the claim thereunder was never abandoned and is not now abandoned.

THE GENERAL RULE.

Text book writers say that there should be a recovery under the circumstances in such a case. We quoted from Roberts, a recognized authority heretofore.

Roberts Federal Liabilities of Carriers, 2nd Edition, Volume 2, pages 1358-1359.

CONCLUSION.

The Circuit Court of Appeals erred in failing to follow the Layton case, the Davis case, the McNaney case and the Howell case.

The court was clearly in error in saying that a brakeman was not "within the class" intended to be protected by the act.

The Circuit Court was also in error on the question of proximate cause.

While the general principles have been heretofore determined by this court, and *contrary* to the decision of the Circuit Court, the precise question has not been passed upon.

The question should be determined because the matter is of importance to thousands of railroad men in the country. It involves an interpretation of the Federal Statutes as to handholds and running boards. Basically and fundamentally and as a proposition of general law the decision of the Circuit Court of Appeals is erroneous. A writ of certiorari should be granted to correct and clear up this wrong.

Respectfully submitted,

TOM DAVIS,
ERNEST A. MICHEL,
419 Metropolitan Bank Building,
Minneapolis, Minnesota,
Attorneys for Petitioner.

FILE COPY

SEP 24 1934

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent,
400 West Madison St.,
Chicago, Illinois.

WARREN NEWCOME,
NELSON J. WILCOX,
Of Counsel.

INDEX.

	Page.
Opinion Delivered in Court below	1
Foreword	1
Statement of the Case	4
Foreword	6
Summary of Argument	7
Argument	8
I. Decision of Court Below not in Conflict with the Decision of any other Circuit Court of Appeals on the Same Matter	8
II. Decision of Court Below not in Conflict with Applicable Decisions of this Court	10
III. The Question involved already settled by the Applicable Decisions of this Court	16
Conclusion	21

TABLE OF CASES.

	Page.
Chesapeake & O. Ry. Co. v. Mihas, 280 U. S. 102	16, 21, 22
Chesapeake & O. Ry. Co. v. Nixon, 271 U. S. 218	16, 20, 21, 22
Chesapeake & O. Ry. Co. v. Smith, 42 Federal (2d) 111	8, 9
Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752	15, 16
Davis v. Wolfe, 263 U. S. 239	10, 13, 14, 15, 16, 18, 19, 20
Fairport P. & E. R. Co. v. Meredith, ... U. S. ..., 54 S. C. R. 826	10, 14, 15

Frye v. C. R. I. & P. R. R. Co., 157 Minn. 52, 195 N. W. 629 ..... 15, 16
Lang v. N. Y. Cent. R. R., 255 U. S. 455 ..... 14, 15, 16, 18, 19, 20, 21, 22
Lehigh Valley R. Co. v. Howell, 6 Federal (2d) 784 .. 8, 9
Louisville & Nashville R. R. Co. v. Layton, 243 U. S. 617 ..... 10, 11, 12, 13, 15, 16, 18, 19, 20
McNaney v. C. R. I. & P. R. Co., 132 Minn. 391, 157 N. W. 650 ..... 15, 16
Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66. 10, 12
O'Donnell v. Providence & W. R. Co., 6 R. I. 211 21
Roberts, Federal Liability of Carriers (2nd Edit.), Vol. 2, p. 2028 5
St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243 .. 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22

TABLE OF STATUTES.

Page.
Act of March 2, 1893, C. 196, Sec. 4, 27 Stat. 531, 45 U. S. C. Sec. 4 (handholds) 4
Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. Sec. 51 (Employe's Liab. Act) 4
Act of April 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. Sec. 11 (running boards) 4

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

OPINION DELIVERED IN COURT BELOW.

G. D. Swinson vs. Chicago, St. Paul, Minneapolis and Omaha Railway Company, ... Federal (2d), Page ...., C. C. A. 8. Opinion filed August 1, 1934, but not yet officially reported (R. 122 to 129).

FOREWORD.

Petitioner's brief does not contain a statement of the case, as required by this court's Rule 27 (d), (former Rule 25 (d)), and his Summary of Facts, so-called, on Pages 3 and 4 of the

Petition is inconclusive and inaccurate. For these reasons we deem it advisable to make a concise statement of the case. Before doing so, however, we desire to direct the Court's attention to, and to correct, the following statements in the Petition, regarding the theory of the trial and lower appellate courts' decision and respondent's claims therein:

> "1st: That the only question involved in this case is whether a railway employe can recover if he is injured because of the giving way of a grabiron at the end of a railway tank car when plaintiff had his foot thereon, the railroad company admitting that there would be liability if he had his hand on the grabiron, but claiming there would be none when he had his foot thereon." (Petition, p. 1).
>
> "The railroad company, respondent, claimed that because petitioner put his *foot* on the grabiron instead of his *hand*, that he could not recover, and that he was not 'within the *class*' for whose benefit the statute was enacted, although he was a *railway brakeman*."
>
> "The Circuit Court of Appeals of the Eighth Circuit upheld the trial court on the theory that petitioner could not recover because he put his *foot* on the instrumentality, although he could have recovered had it given way when he had his *hand* thereon." (Petition, p. 4).

These statements are wholly misleading and neither correctly state respondent's claim in the courts below nor the theory on which the trial court directed a verdict and the Circuit Court of Appeals affirmed the judgment entered thereon.

Petitioner was injured while exerting pressure with his right foot on an end handhold to secure leverage in releasing a tight brake on an oil tank car, the foot pressure so exerted on the handhold causing it to pull away from, and split the end running board to which it was affixed (R. 5, 6, 7). This end handhold was no part of any ladder or step leading from

near the ground to the running board and petitioner was utilizing the handhold solely as a foot brace upon which to exert pressure to secure leverage in releasing the brake and not as a ladder rung or step to stand on in riding or climbing on the car (R. 123, Lines 17, 18, 19, 33, 34, 35).

The claim of respondent and the theory of the courts below can best be indicated by the following from the opinion of the Circuit Court of Appeals:

> "It is contended, however, that since Swinson was using this handhold as a foot hold, foot rest or foot brace, the defendant owed him no duty to furnish him a handhold sufficient for that purpose or any handhold at all, and that he was in no better position in using a defective handhold for a foot hold than he would have been in had there been no handhold and had he been injured in groping for a non-existent handhold with his right foot." (R. 124, first paragraph).
>
> "* * * * where an appliance is used or relied upon for a purpose and function not intended, and its failure causes injury, it cannot be said to be the proximate cause of the injury, because the injury is not the natural, probable and foreseeable consequence of the failure to comply with the law. So in this case, while the giving way of the handhold resulted in Swinson's injuries, the failure of the defendant to comply with the provisions of the law cannot be said to be the proximate cause of those injuries which resulted from the unexpected and unintended use which was made of the handhold, nor was Swinson, under the circumstances, one of the class for whose benefit the law was enacted or to whom the duty of complying with it was owed, since his injuries were not 'within the evil against which the provisions for such appliances are directed.'" (R. 128 bottom, 129 top).

It will be seen that it is not a question of whether Swinson had his hand on the handhold or his foot, but whether, while

using the handhold for a purpose for which it was not intended or required by the Safety Appliance Acts he is entitled to recover as for a violation thereof.

STATEMENT OF THE CASE.

Petitioner brought this action in the United States District Court, District of Minnesota, Fourth Division, under the Federal Employers' Liability Act, (Act of April 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. Sec. 51), to recover for personal injuries alleged to have resulted from respondent's violation of the Safety Appliance Acts relating to handholds (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531; 45 U. S. C. Sec. 4) and running boards (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. Sec. 11). Respondent denied liability. At the close of the evidence the trial court directed a verdict for respondent (R. 67), upon which judgment was entered (R. 113) and the Circuit Court of Appeals for the Eighth Circuit, on August 2, 1934, affirmed this judgment (R. 129).

Petitioner, a railway freight brakeman, was injured at Mitchell, South Dakota, September 17, 1932, while releasing the handbrake at the west end of an oil tank car (R. 71, 73), then moving slowly westward, when one end of the horizontal handhold affixed at the North side of the west end of the running board at the west end of the car pulled away from, and split the running board (R. 5, 6, 7). Exhibits 8 and 9 are photographs of the west end of the car and Exhibit 8 shows the handhold immediately after the accident (R. 71, 73).

The tank car was equipped with end and side running boards that extended around the car. The running board at the west end of the car was 11 inches wide (east to west), 9 feet long (north to south), and the handhold was 18 inches long and at

each end was bolted to the under side of the board, extended horizontally or outward from the west edge of the running board 2¾ inches and was 1¾ inches, or the thickness of the board, below the upper surface thereof. The brake staff was in the middle (east to west) of the end running board and 34 inches from the board's north edge (R. 17, 18, 21, 22).

The brake was tightly set and to release it required the application of considerable force to the brake wheel. To exert such force petitioner placed his left foot on the surface of the running board back of the brake pawl and his right foot down on to this handhold and as he pulled on the brake wheel and exerted foot pressure downward and outward on the handhold its north end pulled through and split the running board, overbalancing petitioner and causing him to fall to his injury (R. 5, 6, 7).

The Interstate Commerce Commission's Safety Appliance Standards Order of March 13, 1911, required that the end running board have a minimum width of 6 inches and permitted the end handholds to be affixed to the end of the end running board, extending either horizontally outward or vertically downward (R. 22, 23; Roberts' Federal Liability of Carriers (2nd Ed.), Vol. 2, P. 2028 top). On 90% of the tank cars in use at the time, the handholds at the end of the end running boards extended downward, either out from the running board, as shown on Exhibits 14 and 15 (R. 83, 85), or back under the running board as shown on Exhibits 13, 16, 19, 21 and 24, (R. 81, 87, 91, 95, 101), or had some obstacle between the handhold and the brake, as shown on Exhibits 13, 14, 15, 20, 22, 24, 25, (R. 81, 83, 85, 93, 97, 101, 103, 123 bottom), making it impossible to reach with the foot while standing on the running board at the brake (R. 29, 30, 34 to 47 incl.). Each tank car of the type involved has a similar handhold affixed to the end

running board in the same manner at each side of each end of the car (R. 23).

FOREWORD.

The difficulty of treating the question at issue in an orderly and concise manner is enhanced by petitioner's failure in his brief to comply with the rules of this court respecting assignments of error (Rule 27 (e), former Rule 25 (e)), and summary of points relied on in the argument (Rule 27 (f), former Rule 25 (f)).

In his complaint petitioner alleged a violation of the Safety Appliance Acts relating to running boards and in his petition herein refers to that allegation and quotes a portion of the statute (Petition, P. 2), but nowhere else in his petition and brief does he argue this point and the Circuit Court of Appeals in its opinion states that the alleged violation of the Act relating to running boards was not urged in that court (R. 125 top). It seems too clear to require argument that at the time he was injured petitioner was making no use of the running board as such and that the Safety Appliance Acts do not require secure running boards so that end handholds may be affixed thereto, but only to stand and walk on. Therefore, respondent will not further argue with respect to this alleged violation.

Both the trial and appellate courts found that when petitioner was injured he was using the handhold in question for a purpose for which it was not intended or required by the Safety Appliance Acts (R. 66, 67, 124). In his Petition and Brief petitioner argues that notwithstanding such fact, he comes within the class entitled to the protection of the Safety Appliance Acts relating to handholds and is entitled to recover solely because he was injured by reason of a defective hand-

hold while engaged in the performance of his duties as a brakeman. Therefore, unless the decision of the court below, (1), is in conflict with the decision of some other Circuit Court of Appeals on the same matter; or (2) is in conflict with the applicable decisions of this court or (3) the question involved has not already been settled by the applicable decisions of this court, there are no special or important reasons why this court, in the exercise of a sound judicial discretion, should review the judgment of the lower court.

SUMMARY OF ARGUMENT.

I. Decision of court below not in conflict with the decision of any other Circuit Court of Appeals on the same matter.

II. Decision of court below not in conflict with applicable decisions of this court.

III. The question involved already settled by the applicable decisions of this court.

ARGUMENT.

I.

DECISION OF COURT BELOW NOT IN CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

Petitioner cites *Lehigh Valley R. Co. v. Howell,* 6 Federal (2d) 784 (C. C. A. 2), and *Chesapeake and O. Ry. Co. v. Smith,* 42 Federal (2d) 111, (C. C. A. 6), and claims that they are in conflict with the decision in the instant case.

Howell was injured while in the act of stepping from one of the rungs of the end ladder on a freight car to the brake platform preparatory to releasing the handbrake thereon. As he placed his hand on the brake wheel to pull on it to release the brake he incidentally used it as a support to assist him in completing his climb to the brake platform, and as he did so the ratchet rose up over the pawl, causing the brake to unwind and injuring Howell. The brake was defective for its intended use and Howell sued as for a violation of the Safety Appliance Acts requiring efficient handbrakes. The railway company contended that because Howell was not actually pulling on the brake wheel at the time it rose up and caused his injury but was using it as a handhold, he was using the brake for a purpose for which it was not intended or required by the Safety Appliance Acts and, therefore, could not recover as for a violation thereof. The Circuit Court of Appeals, while recognizing that if he had been using it primarily and solely as a handhold he might not be entitled to recover as for a violation of the Acts relating to handbrakes, held that in fact at the time he was injured he was proceeding to release the brake and had hold of the brake wheel to pull on it for that express purpose,

and that merely making an incidental use of it as a support in climbing to the brake platform did not preclude recovery as for a violation of the handbrake statute. In the case at bar Swinson was not using the handhold either primarily or incidentally for its intended purpose, but solely as a foot brace to secure leverage to exert pressure in releasing the brake. There is no conflict between the lower court's decision herein and that in the *Howell* case.

In the *Smith case* the employe involved was riding in the caboose of a train and was injured because of an unexpected and abrupt reduction in speed due to defective air brakes. He sued as for a violation of the Safety Appliance Acts requiring automatic air brakes on trains so that the locomotive engineer could "control its speed without requiring brakemen to use the common handbrake for that purpose". The railway company contended that because such unexpected setting of the air brakes did not require the brakemen on this train to use the common handbrake to control the train's speed, Smith could not recover as for a violation of the air brake provisions. Manifestly, Smith was injured as the direct result of the failure of the air brakes to function when used for their intended purpose, that is, to control the speed and stopping of the train so as to prevent injury to employes and passengers. Petitioner in the case at bar was not only not using the handhold for its intended purpose, but was wilfully *misusing* it, the natural tendency of such misuse being to make defective a handhold otherwise safe and secure for its intended use. Therefore the decision in the *Smith* case is not in conflict with the decision of the court below.

It will be seen that the decision of the court below is not in conflict with that of any other Circuit Court of Appeals.

II.

DECISION OF COURT BELOW NOT IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

At Page 26 of his Brief, petitioner states: "While the general principles have been heretofore determined by this court, and *contrary* to the decision of the Circuit Court, the precise question has not been passed upon." This is incorrect, as the applicable principles *have* been determined by this court, but as will be later shown, the decision of the Court below is not contrary to those principles. This court has frequently held that where it has laid down controlling principles it will not review on certiorari, simply because the facts in a given case happen to differ from those involved in the decisions laying down the controlling principles. Such is the situation here.

Petitioner contends that the decision of the court below is in conflict with the decisions of this court in *Louisville & Nashville R. R. Co. v. Layton,* 243 U. S. 617; *Minneapolis & St. Louis R. R. Co. v. Gotschall,* 244 U. S. 66; *Davis v. Wolfe,* 263 U. S. 239, and *Fairport P. & E. R. Co. v. Meredith,* ... U. S. ...., 54 S. C. R. 826.

The *Layton* case was decided April 30, 1917. The sole question therein was whether an employe, injured by the failure of the couplers on two cars to couple automatically on impact, was precluded from recovering as for a violation of the Safety Appliance Acts relating to couplers, because at the time he was not between the ends of the two cars engaged in the coupling operation, and consequently was not one of those for whose benefit that Safety Appliance Act was passed. This court held that while one of the purposes of the Safety Appliance Acts relating to couplers was to obviate the necessity of men going between the ends of cars to couple and uncouple, it

was also the purpose of the Act to require couplers that would couple automatically by impact. Layton *was* injured as the direct result of the failure of the two cars to couple automatically on impact. This court in the *Layton* case was urged to deny recovery on the claim that in its previous decision in *St. L. & San Francisco R. R. v. Conarty,* 238 U. S. 243, it had held that recovery under the Act would be denied unless the employe when injured by a defective coupler was between the ends of cars engaged in a coupling operation. This court refused to so construe its decision in the *Conarty* case. The language of this court in the *Layton* case to the effect that the test of recovery was whether the failure to obey the Safety Appliance laws was the proximate cause of injury to an employe in discharge of his duty and "not from the position the employe may be in or the work which he may be doing at the moment when he is injured" (243 U. S. 621), must be considered in relation to the facts in that case, and is not entitled to the broad construction contended for by petitioner. When the court in that case referred to the "position" of, and the "work" the employe was doing, it meant that if the failure of the coupler to function for its intended purpose was the proximate cause of his injuries, and he was then in the discharge of his duty and, therefore, an employe of the carrier within the purview of the Federal Employers' Liability Act, he could recover even though at the time not between the ends of cars engaged in a coupling operation. In the *Layton* case the couplers involved were being used for their intended purpose to couple automatically on impact and, therefore, Layton was within the class entitled to the benefit of the Safety Appliance Acts relating to couplers and his injury was a proximate result of the violation of those acts. Had the court intended any other construction to be placed upon its opinion in the *Layton*

case, it would have therein overruled its decision in the *Conarty* case, which it did not do, because in the *Conarty* case recovery was denied because Conarty was not within the class entitled to the benefit of the Acts, for the reason that he was attempting to utilize the coupler on the defective car to provide a space between cars, which this court held was not the purpose for which it was required or intended by the Act. There is no conflict between the decision in the *Layton* case and that in the instant case.

The *Gotschall* case was decided May 21, 1917. Gotschall, while riding in a car in a train that separated because the coupling apparatus failed to function properly, was injured as the direct result thereof. So far as material here, the question in that case was whether the mere separation of the couplers was proof of a violation of the Safety Appliance Acts relating to couplers. This court held that it was. The purpose of the Act was to require couplers that would not only couple and uncouple automatically, but would remain coupled. Gotschall was injured as the direct result of the failure of these couplers to perform this intended function. Whether Gotschall was within the class entitled to the protection of the Acts because at the time he was not between the ends of cars engaged in a coupling operation, was not discussed by this court, nor was the *Layton* or *Conarty* case referred to in its opinion. Admittedly, in the instant case, if Swinson had been using the handhold for the purpose for which handholds were required and intended by the Safety Appliance Acts, the giving way of it would be evidence of a violation of the Acts and he would be within the class entitled to protection thereunder. There is no conflict between the decision in the instant case and that in the *Gotschall* case.

The *Wolfe* case (referred to in petitioner's brief as the *Davis* case) was decided November 12, 1923. The question therein was whether Wolfe, admittedly injured because of a defective handhold while using it as such, should be denied relief as for a violation of the Safety Appliance Acts relating to handholds because at the time he was not engaged in a coupling operation. This court held the mere fact that the Safety Appliance Acts relating to couplers was the statute involved in the *Layton* case, did not prevent the principles enunciated in the *Layton* decision being applicable in the *Wolfe* case, and that while one of the purposes of the Safety Appliance Acts relating to handholds was to give greater security to men in coupling and uncoupling cars, handholds were also required for the security of employes in other than coupling operations, and because Wolfe was not engaged in a coupling operation did not prevent his recovering as for a violation of the Acts relating to handholds. It is significant that when Wolfe was injured he *was* using the handhold as a handhold for its intended purpose and not as a brace for his foot so that he could exert foot pressure thereon to secure leverage in performing some other operation. This court's language in the *Wolfe* case, (which petitioner claims authorizes recovery by him herein as for a violation of the Safety Appliance Acts, although using the appliance for a purpose for which it was not intended or required by the acts), must be considered in relation to the facts in that case. When this court said: "He can recover if the failure to comply with the requirements of the Acts is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection" (263 U. S. 243), it did not mean that an employe using an appliance for a purpose not intended or required by the Act could

recover thereunder. An employe must be in the discharge of duty to be an "employe" under the Federal Employers' Liability Act, and when this court referred to an "operation" it meant that it was unnecessary that the employe be engaged in a "*coupling operation*," and no more. This is evident because while in the *Wolfe* case it distinguished its previous decisions in the *Conarty* case and in *Lang v. N. Y. Central R. R.*, 255 U. S. 455, it reaffirmed and did not overrule the doctrine it had enunciated in those cases, and in referring to the decisions in those cases stated: "The requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes" (263 U. S. 242). In other words, the couplers involved in the *Lang* and *Conarty* cases were not being used to couple or uncouple, but to provide a space between cars, which this court held was not their intended or required purpose under the Act. There is no conflict between the *Wolfe* decision and the decisions in the *Conarty* and *Lang* cases, or between the *Wolfe* decision and that in the instant case.

In the *Meredith* case the respondent was struck at a highway crossing due to the failure of the automatic air brakes on a train to be properly connected and functioning. The railway company contended that respondent, being a traveler at a highway crossing, was not entitled to protection under the Federal Safety Appliance Acts relating to automatic air train brakes because the title of the Acts stated that they were for the protection of employes and passengers on railroad trains. This court held that while the Acts were for the protection of passengers and employes on railroad trains, automatic air train brakes were required to permit the engineer, from the locomotive, to control the speed and to stop the train should occasion

require for the protection of a traveler at a highway crossing, and that such traveler needed such protection as much as an employe or passenger. This court in the Meredith decision, its last expression on the subject, was careful to state that only those persons falling within the terms and intent of the Safety Appliance Acts could recover as for a violation thereof. To support its conclusion therein it cited the *Layton, Wolfe, Conarty* and *Lang* cases under the assumption that all of them were consistent. Respondent in the *Meredith* case was injured as a direct result of the failure of the air brakes to function for their intended purpose. Manifestly, if while groping for the air hose to place her foot thereon in climbing between cars respondent therein had been injured because the hose was disconnected, she would not have been entitled to the protection of the Acts relating to air brakes, because under those circumstances she would be using, or claiming the right to use, the air brake apparatus for a purpose for which it was not intended or required by the Acts. Swinson, the petitioner here, was not attempting to utilize the handhold for its intended or required purpose, that is, as a handhold and for that reason he was not within the class entitled to the protection of the Safety Appliance Acts and the violation thereof as to him was not the proximate cause of his injuries. There is no conflict on principle between the decision in the *Meredith* case and that in the instant case.

Petitioner cites *McNaney v. Chicago, Rock Island & Pacific RR. Co.*, 132 Minn. 391, 157 N. W. 650; *Clapper v. Dickinson*, 137 Minn. 415; 163 N. W. 752 and *Frye v. C. R. I. & P. RR. Co.*, 157 Minn. 52; 195 N. W. 629. While these are decisions of State Courts and not controlling here, respondent will briefly discuss them. The railway company's contention in the *McNaney* case was almost identical with that of the carrier in-

volved in the *Wolfe* case. What has heretofore been said with reference to the *Wolfe* decision is equally applicable to the decision in the *McNaney* case. The decision in the *Clapper* case was based almost entirely on that of this court in the *Layton* case, and what has been said herein with reference to the *Layton* decision applies equally to that in the *Clapper* case. In the *Frye* case there was involved an entirely different Safety Appliance Statute, (Boiler Inspection Act) which required that every locomotive, boiler, tender and all parts and appurtenances thereof be in proper condition and safe to operate *in the service to which the same were put* so that they might be employed in the actual service of the carrier without unnecessary peril to life or limb. The Minnesota Supreme Court held that the appliance involved was defective in the service to which the carrier had put it, and Frye, having been injured because of such defect, was one for whose benefit the provision of the Boiler Inspection Act relied on was passed. The *Frye* case is not in point here, and considered in relation to the facts there involved, is not even indirectly in conflict with the decision in the instant case.

III.

THE QUESTION INVOLVED ALREADY SETTLED BY THE APPLICABLE DECISIONS OF THIS COURT.

There are four decisions of this court which, on principle, are controlling. *St. L. & San Francisco RR. Co. v. Conarty*, 238 U. S. 243; *Lang v. New York Cent. RR. Co.*, 255 U. S. 455; *Chesapeake & Ohio Ry. Co. v. Nixon*, 271 U. S. 218; *Chesapeake & Ohio Ry. Co. v. Mihas*, 280 U. S. 102. The *Lang* and *Conarty* cases involved alleged violations of Safety Appliance Acts. The *Nixon* and *Mihas* cases did not, but the principles therein

stated are applicable here. The Safety Appliance Acts merely changed the common law duty to exercise ordinary care to furnish safe appliances to an absolute duty to do so, but did not alter the rule that such duty was owing only to those for whose protection it was laid down.

The *Conarty* case was decided June 14, 1915. Conarty, while riding the front footboard of a switch engine, was injured in a collision between it and a box car from which the coupling apparatus was missing. Had the coupler knuckle and draw bar on the box car been intact, sufficient space would have remained between the engine and car to have prevented Conarty's injury. Conarty sued to recover as for a violation of the Safety Appliance Acts relating to couplers. He was a switchman and, therefore, according to petitioner's contention in the instant case, was within the class entitled to the protection of the Acts. Notwithstanding, this court held that he could not recover because the Safety Appliance Acts did not require couplers for the purpose of providing a safe place for employes between cars and that couplers were required solely for the purpose of permitting cars to couple and uncouple automatically and remain coupled. Neither Conarty nor any member of his crew intended to couple the engine to the defective car and, therefore, at the time they were not using the coupling apparatus for the purpose for which it was intended and required by the Act. For that reason, even though the coupler was defective and Conarty was a switchman engaged in the performance of his duties, this court held that he was not within the class entitled to the protection of the Act and that the absence of the coupling apparatus on the defective car, under those circumstances, did not operate as a breach of any duty imposed by the statute for his benefit, and, in line with

the opinion of the Circuit Court of Appeals herein, that the violation of the Acts was not as to him a proximate cause of his injury. If Conarty, or any member of his crew, had intended to couple the engine to the defective car, under the doctrine of the *Layton* and *Wolfe* cases, he would have been entitled to recover because in such case the coupling apparatus would be used for the purpose for which it was intended and required by the Act, to-wit, to couple automatically on impact. The *Conarty* decision was considered by this court in the *Layton* case and held inapplicable to the facts therein because Layton's injury resulted from the failure of the coupler to perform its intended purpose and, consequently, Layton was within the class entitled to the benefit of the Acts and his injury was the proximate result of their violation. On the other hand, in the *Conarty* case, the employe involved claimed the right under the Acts to use the coupler to provide for him a place of safety between cars, "the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision through other causes" (263 U. S. 242). Therefore, this court held that he was not within the class entitled to the protection of the Acts and because the railway company was not required to anticipate that he would attempt to use it for such purpose, his injury was not the proximate result of the violation of the Acts. The *Conarty* decision settled the question here involved and the rule therein announced is applicable to this case.

The *Lang* case was decided March 28, 1921. The employe there claimed the right under the Safety Appliance Acts to use the coupling apparatus to provide a space between cars, as in the *Conarty* case. This court's attention was directed to the language it had used in the *Layton* opinion, which, it was claimed, was authority for the proposition that once it appears

that a safety appliance is defective and that the employe is injured in line of duty because of such defect, he can recover regardless of the position he occupies or the operation in which he is engaged at the moment. It was further argued that Lang, being a brakeman injured in line of duty as the result of a defective coupler, was within the class entitled to the protection of the Acts relating to couplers, and that all this court had decided in the *Conarty* case was that Conarty could not recover because when injured he was not between cars engaged in a coupling operation, or, stated otherwise, that this court in the *Layton* case intended to overrule the *Conarty* decision. This court rejected that construction of its decision in the *Layton* case and, after calling attention to the imperative requirement of the Safety Appliance Acts making it mandatory to provide couplers which would couple and uncouple automatically on impact, stated that even after a defect is established, the inquiry then necessarily is, to what situation and when and to what employe does the Act apply, and held that the principles it had announced in the *Conarty* case were applicable to *Lang's* situation. The decision in the *Lang* case considered in relation to that in the *Conarty* case and the treatment of the *Lang* and *Conarty* decisions by this court in the *Layton* and *Wolfe* opinions, clearly shows that this court did not intend to hold in either the *Layton* or *Wolfe* cases that an employe, when using or claiming the right to use a safety appliance for a purpose for which it is not intended or required by the Safety Appliance Acts, can recover merely because a defect causes an injury while he is engaged in performance of his duties as either brakeman or switchman. In the *Lang* case it was contended that the language in the *Layton* decision, on which petitioner herein relies, entitled Lang to recover under the Safety Appliance Acts. This court rejected such con-

tention and held the *Conarty* decision controlling. In doing so it made clear the basis of its decision in the *Conarty* case. Conarty was denied recovery because he claimed the right to use the coupling apparatus on the defective car to provide him a place of safety between it and the engine, or for a purpose for which couplers were not intended or required by the Safety Appliance Acts. Therefore, the absence of the coupler and drawbar on the car was not a breach of any duty imposed for Conarty's benefit under the safety appliance acts, because in that situation he was not one for whose benefit the Acts were passed and the violation of the Acts due to the defect in the coupling apparatus was not the proximate cause of his injury. We are here using the term "proximate cause" in the legal sense in which this court used that term in the *Conarty*, *Layton*, *Lang* and *Wolfe* decisions and are considering whether the violation of the Acts was the proximate cause and not whether the defective coupler, as a physical object, caused the injury. The Safety Appliance Acts impose a duty for the benefit of certain persons in certain situations and it is only when the violation of this duty to those persons in those situations causes them injury that the violation can be said to be the proximate cause thereof.

In the *Nixon* case the employe was injured by reason of being run down by a train while on a track car enroute to his work, due to the failure of an engine crew to keep a proper lookout ahead for him. Had such lookout been kept, he would not have been injured. However, the duty to keep the lookout was not for Nixon's benefit but for that of the public at highway crossings. This court, in effect, held that while a duty owing to the public was violated and the breach of such duty injured Nixon, he could not recover because no duty owed him had been breached. In the instant case Swinson was injured as a

result of respondent's alleged violation of a duty owing only to one using the handhold for its intended purpose. As did this court in the *Nixon* case, the court below denied recovery herein because it did not appear that respondent had violated any duty owing Swinson under the Safety Appliance Acts. The mere fact that respondent under the Acts would be liable to an employe using the handhold for its intended purpose did not make respondent liable to Swinson, nor was his injury one which it was required to anticipate as the result of a violation of a duty it owed another employe using the handhold for the purpose for which it was intended and required by the Acts.

In the *Mihas* case the employe, a switch light tender, was injured while attempting to climb over a coal car standing with a number of others on a switch track when they were suddenly and without warning moved by the railway company's employes. There was evidence that it was customary for trainmen before moving cars to personally notify persons engaged in unloading the same. Such notice, however, was exclusively for men so engaged. Following its decision in the *Nixon* case, and citing *O'Donnell v. Providence & W. R. R. Co.*, 6 R. I. 211, this court held that because the breach was of a duty owed someone else, Mihas could not recover, and, in effect, that the carrier was not required to anticipate that the violation of such duty would cause injury to Mihas.

CONCLUSION.

It will be seen (a) that the decision of the court below is not in conflict with the decisions of the Circuit Courts of Appeals, (b) that the applicable decisions of this court are the *Conarty, Lang, Nixon* and *Mihas* cases, and that the decision of the court below is not in conflict with them; and (c) that

the decision of the court below is in accord with the controlling applicable principles settled and laid down by this court in the *Conarty, Lang, Nixon* and *Mihas* decisions, and since there are no special or important reasons requiring this court to review the decision of the court below, no useful purpose will be served by granting the writ herein prayed for, and that the petition should be denied.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent;
400 West Madison St.,
Chicago, Illinois.

WARREN NEWCOME,
NELSON J. WILCOX,
Of Counsel.

FILE COPY

DEC 10

CHARLES

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
NELSON J. WILCOX,
Of Counsel.

Review Publishing Co., 141 E. Fifth St., St. Paul, Minn.

SUBJECT INDEX.

	Page.
Opinion delivered in Court below	1
Foreword	1
Statement of Case	2
Case	2
Facts	2
Summary of Argument	4
Argument	5
No Substantial Evidence of Actionable Negligence	5
I. Right of Recovery governed exclusively by provisions of Federal Employers' Liability Act	5
II. Under Federal Employers' Liability Act substantial evidence of Actionable Negligence Necessary to Recovery	5
III. No actionable negligence unless breach of duty owed petitioner proximate cause of injury	6
IV. Unless handhold statute imposed duty to furnish secure end handhold for use as foot brace, petitioner's injury not within evil against which its provisions directed, he was not within class entitled to protection thereunder and under circumstances violation of statute due to insecurity of handhold not proximate cause of his injury	7

V. Purpose and intent of Congress in requiring secure end handholds 10

(a) As evidenced by known and ordinary significance of language of handhold statute 10

(b) As understood by administrative body charged with duty to standardize location, etc., of all safety appliances..... 15

(c) Legislative history of handhold statute confirms intent of Congress that language of Act be given known and ordinary significance 19

(d) Legislative history and significant events preceding Safety Appliance Act, 1910, and Safety Appliance Standards Order confirms intent of Congress and understanding of Commission that language of handhold statute be given known and ordinary significance..... 25

(e) Form and location of end handhold indicate intent of Congress and understanding of Commission that it be used solely as handhold 30

(f) Evil against which Handhold Statute directed 33

VI. Petitioner abandoned claim of violation of Running Board Statute and evidence conclusive he made no use of running board as such when injured 34

VII. While using end handhold as foot brace petitioner not one entitled to benefit and protection of handhold statute, and violation, if any, under circumstances not legal proximate cause of injury 35

VIII. Result of perversion of Congressional intent with respect to Safety Appliances 47

Conclusion 48

TABLE OF CASES AND TEXT BOOKS CITED.

	Page.
Campbell v. So. Pac. R. Co., 120 Ore. 122, 250 Pac. 622	8
Chesapeake & O. Ry. Co. v. Nixon, 271 U. S. 218	6, 7, 9, 36, 42
Chesapeake & O. Ry. Co. v. Mihas, 280 U. S. 102	6, 7, 9, 36, 43
Chesapeake & O. Ry. Co. v. Smith, 42 Fed. (2d) 111	44, 45
Chicago G. W. Ry. Co. v. M. St. P. & S. S. M. Ry. Co., 176 Fed. 237	9
Chicago G. W. Ry. Co. v. Schendel, 267 U. S. 287	9, 42
Clapper v. Dickinson, 137 Minn. 415, 163 N. W. 752	44, 45
C. R. I. & P. Ry. Co. v. Murray, 85 Ark. 600, 109 S. W. 549, 16 L. R. A. (N. S.) 984	8
Davis v. Maury, 266 U. S. 401	16
Davis v. Reynolds, 280 Fed. 363, Cert. Denied, 258 U. S. 627	31
Davis v. Wolfe, 263 U. S. 239	36, 40
Duree v. Wabash R. Co., 241 Fed. 454	6
Eugene F. Moran, 212 U. S. 466	38
Fairport, P. & E. R. Co. v. Meredith, 292 U. S. 589	11, 36, 43
Frye v. C. R. I. & P. Ry. Co., 157 Minn. 52, 195 N. W. 629	44, 45

Hahn v. C. M. & St. P. Ry. Co., 157 Minn. 354, 196 N. W. 257 8
Ill. Cent. R. R. Co. v. Williams, 242 U. S. 462..... 16
Johnson v. So. Pac. R. R. Co., 196 U. S. 1..... 19
Labatt, Master and Servant, (2nd Ed.) Sec. 921..... 8
Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455...7, 8, 9, 10, 36, 39
Lehigh V. R. Co. v. Howell, 6 Fed. (2d) 784..... 44
Louisville & N. Ry. v. Layton, 243 U. S. 617..... 36, 38
Louisville & N. Ry. v. Parsons, 213 Ky. 432, 281 S. W. 519 8
Mahutga v. M. St. P. & S. S. M. Ry. Co., 182 Minn. 362, 234 N. W. 474 32
Maillard v. Lawrence, 57 U. S. 250, 16 How. 251.... 11
McClain v. Seaboard Air Line Ry., 34 Ga. App. 86, 129 S. E. 876 8
McNaney v. Chicago, R. I. & P. R. Co., 132 Minn. 391, 157 N. W. 650 ..... 44, 46
Minneapolis & St. L. R. Co. v. Gotschall, 244 U. S. 66. 36, 39
Morrison v. Burgess Sul. Fib. Co., 70 N. H. 406, 47 Atl. 412, 85 Amer. State Reports 634..... 8
O'Donnell v. Providence & W. R. R. Co., 6 R. I. 211.. 7, 38
Old Colony R. Co. v. Com. of Internal Rvenue, 284 U. S. 552 11
Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99 ..... 6, 7
Roberts Federal Liabilities of Carriers, 2nd Ed...3, 16, 17, 29
St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243... 7, 8, 9, 10, 36, 37
St. Joseph G. & I. Ry. Co. v. Moore, 243 U. S. 311.... 31
San Antonio Ry. v. Wagner, 241 U. S. 476..... 5, 6, 7
Seaboard Air Line v. Horton, 233 U. S. 492..... 6
Settle v. St. L. & San F. R. R. Co., 127 Mo. 336, 30 S. W. 125 15

Slater v. C. St. P. M. & O. Ry. Co., 146 Minn. 390, 178 N. W. 813 35
Southern Ry. Co. v. Chestnut, 210 Ala. 282, 97 So. 905 8
United States v. Mo. Pac. R. Co., 278 U. S. 269..... 19
Wabash R. R. v. Hayes, 234 U. S. 86..... 5
W. A. Hover & Co. v. D. & R. G. W. R. Co., 17 Fed. (2d) 881 9
Western Union Tel. Co. v. Schriber, 141 Fed. 538.... 6
Williams v. C. & Alton R. R., 135 Ill. 491, 26 N. E. 661 6, 38

TABLE OF STATUTES CITED.

Page.

Act of February 4, 1887, Chap. C-104, Sec. 21, 24 Stat. 387, as Amended by Act of Mar. 2, 1889, C. 382, Sec. 8; 25 Stat. 862, 49 U. S. C. A. Sec. 21..... 19
Act of March 2, 1893, Chap. C-196, Sec. 2, 4, 27 Stat. 531, 45 U. S. C. A. Sec. 2, 4..... 2, 11, 33
Act of April 22, 1908, Chap. 149, 35 Stat. 65, 45 U. S. C. A. Sec. 51 ..... 2, 5
Act of April 14, 1910, Chap. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A. Sec. 11.....2, 13, 15, 34

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

RESPONDENT'S BRIEF.

OPINION DELIVERED IN COURT BELOW.

G. D. Swinson v. Chicago, St. Paul, Minneapolis & Omaha Railway Company, 72 Federal (2d) 649 (C. C. A. 8).

FOREWORD.

Petitioner's brief does not contain a statement of the case and his summary of facts, so-called, on Pages 3 and 4 of his Petition is inconclusive and inaccurate. Respondent will make a concise statement of the case.

STATEMENT OF THE CASE.

Case.

Petitioner brought this action in the U. S. District Court, District of Minnesota, Fourth Division, under the Federal Employers' Liability Act (Act of Apr. 22, 1908, C. 149, 35 Stat. 65, 45 U. S. C. A. Sec. 51), to recover for personal injuries resulting from respondent's alleged violation of the Safety Appliance Acts relating to handholds (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531, 45 U. S. C. A. Sec. 4), and running boards (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A. Sec. 11). Respondent denied liability. At the close of the evidence the trial court directed a verdict for respondent (R. 76), upon which judgment was entered (R. 101), and the Circuit Court of Appeals for the Eighth Circuit on Aug. 2, 1934, affirmed this judgment (R. 115).

Facts.

Petitioner, a railway freight brakeman, was injured at Mitchell, S. D., Sept. 17, 1932, while releasing the hand brake at the west end of an oil tank car (Ex. 8, 9, R. 80, 81) moving slowly westward, when he applied foot pressure to the horizontal end handhold affixed at the north side of the west end of the end running board, causing the north end of this handhold to pull thru and split the running board (R. 6, 7, 8). Exhibits 8 and 9 are photographs of the west end of the car and Exhibit 8 shows the running board and handhold immediately after the accident (R. 80, 81).

The hand brake was tightly set and to release it required the application of considerable force to the brake wheel. To exert such force petitioner placed his left foot on the surface of the

running board back of and adjacent to the brake pawl, and his right foot down on this handhold. As he pulled on the brake wheel and exerted foot pressure downward and outward on the handhold, its north end pulled through and split the running board, overbalancing petitioner and causing him to fall to his injury in front of the moving car (R. 6 to 12, incl.).

A booklet containing the Interstate Commerce Commission's Safety Appliance Standards Order of March 13, 1911, was received in evidence as Exhibit 12 (R. 25), but is not included in the printed record. For convenience the exact copy of this order appearing in Roberts Federal Liabilities of Carriers (2nd Ed.), Vol. 2, Appendix Q., p. 2010-2038, inclusive, will be referred to herein. The safety appliance requirements respecting tank cars of the type here involved appear under the heading "Tank Cars without End Sills", beginning on Page 2026.

This tank car had end and side running boards that extended around the car. The running board at the west end was 11 in. wide (E to W), 9 ft. long (N. to S.) and the handhold was 18 in. wide. At each end it was bolted to the under side of the board, extended horizontally outward 2¾ in. from the west edge of the running board and was 1¾ in., or the thickness of the board, below the surface thereof. The hand brake staff was in the middle (E to W) of the end running board and 34 in. from the board's north edge (R. 20, 21, 24-25).

The order required this end running board to have a minimum width of 6 in. and permitted the end handholds to be affixed to the end of the end running board extending either horizontally outward or vertically downward (Roberts, p. 2027-8). On 90% of the tank cars in use at the time the handholds at the end of the end running boards extended downward either out from the running board, as shown on Ex. 14 and 15 (R. 86-87), or back under the running board, as

shown on Ex. 13, 16, 19, 21 and 24 (R. 85-88-90-92-95), or had some obstacle between the handhold and the brake, as shown on Ex. 13, 14, 15, 20, 22, 24, 25 (R. 85, 86, 87, 91-93, 95-96), making it impossible to reach with the foot while standing on the running board at the brake (R. 39). Each tank car of the type involved has a similar handhold affixed to the end running board in the same manner at each side of each end of the car (R. 26).

At the risk of repetition, but to remove the erroneous impression created by petitioner's brief as to the cause of injury, it is necessary to emphasize that this end handhold was no part of any ladder or step leading from near the ground to the end running board and petitioner when injured was utilizing the end handhold solely as a foot brace upon which to exert foot pressure to secure leverage in releasing the hand brake and not as a ladder rung or step to stand on in riding or climbing on the car.

SUMMARY OF ARGUMENT.

1. Federal Employers' Liability Act applies, and thereunder substantial evidence of actionable negligence, (breach of duty + proximate cause) necessary to recovery.

2. Safety Appliance Acts relating to handholds impose no duty to maintain secure end handhold for use as foot brace to withstand foot pressure in releasing hand-brake.

3. While so misusing the end handhold petitioner not one entitled to protection of handhold statute, and violation thereof resulting from such misuse not legal proximate cause of his injury.

4. Because petitioner's injury resulted from such misuse of end handhold he cannot recover.

5. Violation of Safety Appliance Acts relating to running boards, not involved.

6. To permit recovery for injury resulting from misuse of end handhold will pervert Congressional intent with respect to all Safety Appliance legislation.

ARGUMENT.

NO SUBSTANTIAL EVIDENCE OF ACTIONABLE NEGLIGENCE.

I. Right of Recovery Governed Exclusively by Provisions of Federal Employers' Liability Act.

Petitioner was injured while working as a brakeman in respondent's employ when both were engaged in interstate commerce. Therefore, his right of recovery, if any, is confined exclusively to, and governed by the provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec. 51), even though the negligence claimed is an alleged violation of a Federal Safety Appliance Statute.

Wabash R. R. v. Hayes, 234 U. S. 86.

San Antonio Ry. v. Wagner, 241 U. S. 476.

II. Under Federal Employers' Liability Act Substantial Evidence of Actionable Negligence Necessary to Recovery.

So far as relevant, this Act provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting * * * by reason of any defect or insufficiency due to its negligence in its cars (or) appliances * * *." (Act of Apr. 22, 1908, C. 149, Sec. 1, 35 Stat. 65, 45 U. S. C. A., Sec. 51).

Thereunder, as construed and applied by this court, petitioner may not recover for injuries resulting from any defect or insufficiency in respondent's cars or appliances unless he first establishes by substantial evidence that the defect or insufficiency was due to respondent's negligence and that the injury was proximately caused by such negligence. Stated differently, to recover he must establish by substantial evidence that respondent was guilty of actionable negligence.

Seaboard Air Line v. Horton, 233 U. S. 492.

This is true even when an alleged violation of a Safety Appliance Statute is involved.

San Antonio Ry. v. Wagner, 241 U. S. 476.

III. No Actionable Negligence, Unless Breach of Duty Owed Petitioner, Proximate Cause of Injury.

It is elementary that if respondent violated no duty owed petitioner, it was not guilty of negligence even though its performance of a duty owed another would have prevented injury to petitioner.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102.

Western Union Teleg. Co. v. Schriber, 141 Fed. 538 (C. C. A. 8).

Duree v. Wabash R. Co., 241 Fed. 454 (C. C. A. 8).

Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99.

This is true even when the duty is one imposed by a safety appliance or other statute. The Safety Appliance Acts merely substitute for the master's common law to use ordinary care to furnish a servant with reasonably safe appliances, the absolute statutory duty to maintain such appliances, but do not change the rule that such duty is owing only to one for whose

protection it is imposed. The violation of the statute is negligence per se only to one to whom the statutory duty is owing.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243;

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455;

Chicago G. W. Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 Fed. 237 (C. C. A. 8);

O'Donnell v. Providence & Worchester R. R. Co., 6 R. I. 211;

San Antonio Ry. v. Wagner, 241 U. S. 476.

Negligence plus proximate cause is actionable negligence. If respondent violated no duty owed petitioner it was not guilty of actionable negligence, because, (a) there would be no negligence; (b) proximate cause is always ~~anterior~~ posterior to negligence; and (c) the violation of a statute arising from the breach of a duty thereunder owed another would not be the proximate cause of petitioner's injuries.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218;

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102;

Palsgraf v. Long Island R. Co., 248 N. Y. 339, 162 N. E. 99;

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243;

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

IV. Unless Handhold Statute Imposed Duty to Furnish Secure End Handhold For Use as Foot Brace, Petitioner's Injury Not Within Evil Against Which Its Provisions Directed, He Was Not Within Class Entitled to Protection Thereunder and Under Circumstances Violation of Statute Due to Insecurity of Handhold Not Proximate Cause of His Injury.

The employer's duty in furnishing an instrumentality to a servant is restricted to seeing that it is reasonably safe for the

performance of the function for which it is furnished, designed and intended to be used. The failure of an instrumentality to function when a servant devotes it to a use for which it is not furnished, designed and intended is not evidence of a breach of any duty owed that servant.

Louisville & N. R. Co. v. Parsons, 213 Ky. 432, 281 S. W. 519.

Campbell v. Southern Pac. R. Co., 120 Ore. 122, 250 Pac. 622.

Southern Ry. Co. v. Chestnut, 210 Ala. 282, 97 So. 905.

McClain v. Seaboard Air Line Ry., 34 Ga. App. 86, 129 S. E. 876.

Labatt, Master and Servant, 2nd Ed., Sec. 921.

Hahn v. C. M. & St. P. Ry. Co., 157 Minn. 354, 196 N. W. 257.

Morrison v. Burgess Sul. Fib. Co., 70 N. H. 406, 47 Atl. 412, 85 Am. State Reports 634.

C. R. I. & P. Ry. Co. v. Murray, 85 Ark. 600, 109 S. W. 549, 16 L. R. A. (N. S.) 984 and cases discussed in annotation following.

This is true even when the instrumentality is required to be furnished by a Safety Appliance Statute.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Therefore, unless the handhold statute imposed on respondent a duty to maintain this end handhold secure for use as a foot brace in the manner it was used, by failing to maintain it secure for such use respondent violated no statutory duty owed petitioner.

Because respondent's failure to maintain it secure may have breached a statutory duty owed one using it as a handhold or

that the performance of the duty owed such person would have prevented injury to petitioner, does not entitle him to recover.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Chesapeake & Ohio Ry. Co. v. Nixon, 271 U. S. 218.

Chesapeake & Ohio Ry. Co. v. Mihas, 280 U. S. 102.

Chicago G. W. R. R. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 176 Fed. 237, (C. C. A. 8).

W. A. Hover & Co. v. D. & R. G. W. R. Co., 17 Fed. (2d) 881 (C. C. A. 8).

If, by the handhold statute, Congress did not intend or require a secure end handhold for use as a foot brace or support to provide leverage in releasing a hand brake, then when petitioner so applied it he used it for a purpose for which it was not intended or required by Congress. In that situation he was not one for whose protection the statute was enacted and the giving way of the handhold under those circumstances did not constitute a breach of any statutory duty imposed for his benefit.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

Likewise, if while so misusing the handhold, petitioner was not within the class entitled to the statutory protection, then the violation of the statute due to the insecurity of the handhold cannot be considered the proximate cause of petitioner's injury. If respondent owed no statutory duty to furnish petitioner either a secure handhold or any handhold at all to use as a foot brace for leverage in releasing the hand brake then his injury was not the natural, probable and foreseeable consequence of respondent's failure to comply with the handhold statute.

Was the provision requiring secure end handholds designed to remedy any evil arising out of the absence of an appliance to provide foot leverage or support to a man releasing a brake? If not, then petitioner's injury was not within the evil against which that provision of the statute was directed and he was not one for whom the act was intended to furnish protection.

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243.

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455.

At the risk of overemphasis, we repeat that it is only where a statute imposes a specific duty for the protection and benefit of a person and the breach of such duty results in injury to him of the character which the statute was designed to prevent, that liability follows. Unless petitioner when injured was using this end handhold for a purpose within the Congressional intent and, therefore, was one for whose protection it was required, the mere pulling out of the handhold under the circumstances would not constitute negligence per se as to him nor would the violation of the statute resulting from the handhold's insecurity under those circumstances be the legal proximate cause of his injury.

For what purpose, and for the protection of what employes, in what situations did Congress require this end handhold to be secure?

V. Purpose and Intent of Congress in Requiring Secure End Handholds.

(a) *As evidenced by known and ordinary significance of language of handhold statute.*

So far as relevant this Act provides: "It shall be unlawful to use any car * * * not provided with secure handholds or grabirons in the ends * * * of each car for greater se-

curity to men in coupling and uncoupling cars". (Act of Mar. 2, 1893, C. 196, Sec. 4, 27 Stat. 531, 45 U. S. C. A. Sec. 4).

A question of statutory construction is involved.

Fairport P. & E. R. Co. v. Meredith, 292 U. S. 589, 594.

> "The popular and received import of words furnishes the general rule for the interpretation of public laws * * * and where the legislature adopts such language in order to define and promulge their actions or their will, the just conclusion from such a course must be that they not only themselves comprehended the meaning of the language they had selected, but had chosen it with reference to the known apprehension of those to whom the legislative language is addressed and for whom it is designed to constitute a rule of conduct * * *."
>
> *Maillard v. Lawrence*, 57 U. S. 250, 261, 16 How. 251, 261.

We must conclude Congress used the words "handholds" or "grabirons", in their known and ordinary significance at that time.

Maillard v. Lawrence, supra.

Old Colony R. Co. v. Comm. of Internal Revenue, 284 U. S. 552.

What was the known and ordinary significance of these words on Mar. 2, 1893? Without extrinsic evidence or the aid of a dictionary then current, the meaning of the words "handholds" or "grabirons" is clear and understandable to the ordinary person. A handhold is, as its name implies, a device to be grasped by the hand, a grabiron, as its name implies, is one to be grabbed by the hand. That this was their known and ordinary significance when Congress used them in the Act is confirmed by the definitions lexicographers attached to them.

Handhold: "To hold or grasp with the hand."

The Century Dictionary (1889).

Handhold: "1, hold for the hand, grip with the hand; 2, that portion of any implement that is grasped by the hand.

Grabiron: "the name of an appliance for seizing or clutching".

Oxford English Dictionary (1888).

Handhold: "1, a hold or grip with the hands; something for the hand to hold on to; 2, the part of an implement that is especially fashioned to be held in the hand."

Webster's Unabridged Dictionary, 1890.

Congress intended to use these words in their known and ordinary significance. Had it intended that the appliance which it designated as a handhold was to be used primarily or incidentally as a foot brace or support to secure leverage in releasing a handbrake, we must assume it would have used descriptive words of known and ordinary significance to indicate that intent, or it would have used words of known and ordinary significance to clearly describe and designate an appliance intended, and safe and adequate for that use.

The language of the Act indicates that the primary evil Congress intended to remedy by requiring secure end handholds was that arising from the hazards and dangers to trainmen when required to be between the ends of cars due to the prevalance of link and pin couplers and the absence of automatic couplers. Therefore, we must assume it intended to require an appliance which, while trainmen were between cars, would give them greater security than would be the case in the absence of end handholds.

With that in mind, can it reasonably be contended that Congress would designate an appliance as a handhold, permit it to be located at any place on the end of a car and at the same time intend it for use as a foot brace or support to secure leverage

in releasing a hand brake, without also standardizing the location of the brake in relation to the handhold so that the end handhold would be available for such use on every car or without requiring a form of handhold that would permit its safe use at all times as a foot brace?

Efficient handbrakes were not required by federal statute until April 14, 1910 (Act of Apr. 14, 1910, C. 160, Sec. 2, 3, 36 Stat. 298, 45 U. S. C. A. Sec. 11), and their location was not standardized until March 11, 1911 (Commission's Safety Appliance Standards Order of Mar. 11, 1911). Therefore, in 1893 there was no standard location for either hand brakes or end handholds; the latter being back under the running board inaccessible for use as a foot brace in releasing the handbrake (Interstate Commerce Commission Annual Report, 1895, P. 266 and cuts following), and the handbrake might then be located either to the right or left of the drawbar.

The failure of Congress to then provide a uniform relative location for end handholds and handbrakes further indicates its intent to use the words "handholds" or "grabirons" in their known and ordinary sense: Appliances to grasp, hold, seize or clutch with the hands. To conclude otherwise would require an assumption that Congress intended to attach to these words an unknown and extraordinary significance. This we may not do.

Congress desired greater security for trainmen. In the release of handbrakes it could attain that result most effectively, (as it later did), by requiring secure running boards rather than handholds or grabirons, the use of which for foot braces or supports would result in greater insecurity to trainmen and thereby defeat the purpose of the handhold statute.

If Congress did not feel that running boards were adequate, safe and intended to stand on and secure whatever leverage

was necessary while releasing a handbrake, why did it not in the 1910 Act require an additional appliance for that purpose and designate it by a name which would indicate it was intended for that use?

That by the Act of Mar. 2, 1893, Congress intended to require appliances to grasp and use with the hands is apparent, because it did not at that time attempt to prescribe or require the safety appliances intended to be used to climb, step and walk on. Not until the passage of the Act of Apr. 14, 1910, did it specifically designate and require appliances to climb, step, walk and stand on and then it designated them by names (sill steps, ladders and running boards), which indicated to the ordinary mind that they were intended for such use.

Had Congress felt that the appliances it designated as handholds and grabirons were intended for use as foot braces or supports, or to climb, step, walk and stand on, it would have been unnecessary in the 1910 Act to designate for that use additional appliances, such as sill steps and ladders, by names which clearly indicated they were intended for that purpose. Instead, it could merely have required handholds or grabirons at the locations where sill steps and ladder rungs were thereunder required.

In the 1910 Act Congress required that all cars having ladders be equipped with secure handholds or grabirons on their roofs at the tops of such ladders, thereby indicating that in the Congressional mind there was a clear distinction between the terms "handholds" and "ladders", and of the intended use of each.

If the word "handholds" or "grabirons" is given its ordinary and known meaning, it logically follows that when Congress used these words in the handhold statute it intended to designate an appliance for trainmen to grasp with their hands for

their greater security and not one for use as a foot brace or support for their greater insecurity while releasing a handbrake.

How the word "handhold" was understood by one court prior to the passage of the handhold statute is indicated by the following:

> "A railroad is bound to furnish and keep in repair proper handholds on the ends of its box cars for the use of brakemen, and it is negligence on the part of the company to send out a car, the handhold on which is so bent that it can only be grasped at the ends." *Settle v. St. L. & San F. R. R. Co.*, 127 Mo. 336, 30 S. W. 125.

(b) *As understood by administrative body charged with duty to standardize location, etc. of all safety appliances.*

To make uniform the number, location and dimensions, and manner of application of handholds, sill steps, running boards, ladders and handbrakes, Congress enacted the Act of April 14, 1910 (Act of April 14, 1910, C. 160, Sec. 3, 36 Stat. 298, 45 U. S. C. A., Sec. 12), which, so far as relevant, reads:

> "Sec. 3. * * * the Interstate Commerce Commission, after hearing, shall designate the number, dimensions, location and manner of application of the appliances provided for by section two of this Act and section four of the Act of March second eighteen hundred and ninety-three, and thereafter said number, location, dimensions and manner of application as designated by said Commission shall remain as the standard of equipment to be used on all cars * * * and failure to comply with any such requirement of the * * * Commission shall be subject to a like penalty as failure to comply with the requirements of this Act."

Under Section 3 Congress intended to standardize the character and location of handholds so that they would be placed

as nearly as possible at a corresponding location on every car, thereby preventing the betrayal of an employe to his injury when he instinctively reached for the only protection available to him when the necessity therefor arose. To effect the uniformity desired in the interests of safety, Congress delegated to the Interstate Commerce Commission (an administrative body experienced in railroad operation and solicitous for the safety of railroad employes), the task of designating such location and construction. *Illinois Central R. R. Co. v. Williams*, 242 U. S. 462; *Davis v. Maury*, 266 U. S. 401.

After hearing, investigation and seeking the views of railroad employes and managements, the Commission entered its Safety Appliance Standards Order of Mar. 13, 1911 (Robert's F. L. C. 2nd ed., Vol. 2, Appendix Q, p. 2010), wherein it prescribed the number, dimensions, location and manner of application of said appliances. The standards so set provide the rule for the carrier's duty with respect thereto. Because of the Commission's statutory duty to standardize the location, etc. of these safety appliances to afford greater security to men working on or about cars, we must assume it performed such duty.

In specifying the appliances required by the Act of Mar. 2, 1893, the Commission designated them as handholds and provided for their location so as to be readily accessible for a man to grasp while upon or between cars. It is unnecessary to repeat that when it used the word "handhold" in this order it intended to attach thereto the ordinary and usual meaning of that term, that is, an appliance to be grasped with the hand. That such was its intention is evidenced by the fact that it designated the safety appliances commonly used to climb, walk and step on as sill steps, ladders and running boards, indicat-

ing by the names it attached to them that they were to be used to climb, stand and walk on.

In connection with tank cars of the kind with which we are here concerned, it provided (1), that the end running board thereon should have a minimum width of 6 inches; (2) that one end handhold be located near each side on each end of the car on the running board not more than 2 inches back from the edge of the running board projecting downward or outward; and (3) that the brake be located on the end of the car to the left of the center. (Robert's F. L. C. (2nd Ed.) Vol. 2, App. Q, p. 2026, 2027, 2028). Its conclusion with respect to the necessary width of a running board was reached after full consideration of the purposes of a running board and we must assume that the Commission knew that running boards would be used by, and were intended for, men to stand on while setting and releasing brakes. To be consistent we must further assume that when it specified such minimum width it was its deliberate judgment that such width would be sufficient for that purpose. Otherwise it would have provided for a wider running board, as it had the power to do.

If the Commission had intended the appliance it designated as an end handhold to be used as a foot brace or support manifestly it would not have permitted it to be affixed projecting downward and to set back from the edge of the running board as much as 2 inches, because by so doing it precluded its use for that purpose. Likewise, if it had intended that this handhold be used as a foot brace or support in connection with the operation of a brake it would have related the standard location of the brake to the handhold so that the latter could be used for that purpose at all times. This it did not do. Under the order the brake may be located so far to the left of the middle and the handhold so far to the right of the north or left-

hand end of the end running board as to preclude the handhold's use for a foot brace or support in releasing the brake, even when the handhold extends outward horizontally, as did this end handhold. Another indication that the Commission intended that brakes be released by men standing on the running board and that the end handhold was not required as a foot brace.

The Commission also specifies a brake platform at the end of a box car. The area of this platform, as prescribed by the order, is much smaller than the running board here and there is no handhold available for use in releasing the brake while standing on this platform (Ex. 27, R. 97).

On a tank car the brake may be attached to the tank. In such case neither the handhold in question, nor any other handhold, is available for use as a foot brace or support in releasing the brake (Ex. 16, R. 88). The order requires a handhold on each side of each end of the car attached to the running board, extending either downward or outward. Manifestly, the Commission in prescribing this location intended each of these handholds to be used for the same purpose. Assuming these handholds to extend horizontally outward from the end of the running boards, the end handhold on the south side of this car could not be reached by a man while standing on the running board releasing a brake, and of course, those on the other end where a brake is not located could not be used for the purpose of a brace or support in releasing a brake.

If the Commission had intended that the device it designated as a handhold was necessary for, or would be used as a foot brace or support, it easily could have designated it by a name such as a brake step or stirrup to so indicate. It also was interested in safety and must have recognized the fact that the appliance named as a handhold could not be safely used as a

foot brace or support because, (1) it was a narrow rounded piece of iron five-eighths inch in diameter, 1¾ inches below the surface of the running board and would not provide safe or proper support for the feet; (2) if wet, slippery or worn, it might safely be used as a handhold but not as a foot brace or support, and (3) if necessary as a foot brace or support it should be in the same location on all cars, otherwise its absence would be more dangerous than its presence in an insecure condition. It will be seen that if the word "handholds" as used in this order is given its known, usual and ordinary meaning, it logically follows that the Commission standardized the location of this appliance so it could be used to grab hold or grasp with the hand and not as a foothold or brace, and that the Commission's understanding corresponds with the Congressional intent as evidenced by the language of the Act.

(c) *Legislative history of handhold statute confirms intent of Congress that language of Act be given known and ordinary significance.*

The reasons for, and the significant circumstances leading up to the enactment of a statute may be noticed in confirmation of the meaning conveyed by the words used therein. *Johnson v. Southern Pacific,* 196 U. S. 1; *United States v. Missouri Pacific R. Co.,* 278 U. S. 269-278-279.

The annual reports of the Interstate Commerce Commission to Congress are required by the Act of Feb. 4, 1887, C. 104, Sec. 21, 24 Stat. 387, as amended by Act of Mar. 2, 1889, C. 382, Sec. 8, 25 Stat. 862 (49 U. S. C. A. Sec. 21).

The first official recommendations for Federal legislation respecting safety appliances are contained in the annual reports of the Commission for 1889, 1890, 1891 and 1892, and relate exclusively to the necessity for automatic couplers and

continuous train air brakes. The attention of Congress was directed to: (1) the injuries to, and death of trainmen due to the old type of link and pin coupler then in use, necessitating men going between the ends of cars to couple and uncouple cars; (2) the necessity for uniform couplers that would couple automatically, uncouple and stay coupled without the necessity for men going between the ends of cars; (3) the exclusive use of handbrakes to stop and control the speed of freight trains, necessitating men being on top of rapidly moving cars; (4) the necessity for continuous train air brakes to be operated by the locomotive engineer, thereby eliminating the necessity for men being on top of rapidly moving cars. Prior to Mar. 2, 1893, the Commission made no mention of, nor did it recommend legislation requiring handholds or grabirons at the ends and sides of cars (Annual Reports of Interstate Commerce Commission to Congress for years 1889, 1890, 1891 and 1892).

At the first session of the Fifty-second Congress five bills relating exclusively to automatic couplers and continuous train air brakes were introduced in the Senate and referred to its committee on Interstate and Foreign Commerce: S. 811 (Cong. Rec. Vol. 23, Part 1, Page 44); S. 893 (C. R., V. 23, Pt. 1, p. 63); S. 1618 (C. R., V. 23, Pt. 1, p. 311); S. 2574 (C. R., V. 23, Pt. 3, p. 2037), and S. 2951 (C. R., V. 23, Pt. 4, p. 3436, Pt. 5, p. 4846), and at the same session ten similar bills were introduced in the House and referred to its committee on Interstate and Foreign Commerce: H. R. 117 (C. R., V. 23, Pt. 1, p. 128); H. R. 180 (C. R., V. 23, Pt. 1, p. 130); H. R. 211 (C. R., V. 23, Pt. 1, p. 131); H. R. 441 (C. R., V. 23, Pt. 1, p. 199); H. R. 582 (C. R., V. 23, Pt. 1, p. 204); H. R. 611 (C. R., V. 23, Pt. 1, p. 205); H. R. 5134 (C. R., V. 23, Pt. 1, p. 731); H. R. 6187 (C. R., V. 23, Pt. 2, p. 1308); H. R. 6648 (C. R., V. 23, Pt. 2, p. 1578) and H. R. 7512 (C. R., V. 23, Pt. 3, p. 2484).

On February 18, 1892, a hearing on the House bills was held before the House Committee on Interstate and Foreign Commerce, where the first official mention was made of the necessity for Federal legislation requiring handholds at the ends and sides of each car. The purpose for which it was claimed they were required is shown by the following testimony and statements at this hearing, which include every mention made at the hearing with respect to handholds or grabirons. (Page references are to pages of transcript referred to at end of quotation.)

"Rep. O'Neil (Chairman of Committee). I am under the impression that three-fourths of the lives lost and injuries sustained are caused by the absence of safety rails on the tops of cars and safety rails at the ends of cars. I believe that two-thirds of those men were injured because they have nothing on earth to catch hold of when they slip or the train moves. If there was a rail along the side of the car and at each end of the car, so that a man would have a chance to catch hold of it, there would not be anything like so many accidents. If there was a rail on the top of the car, so that when a man slips from the slanting footboard, he would have something to catch himself—A Member: I do not see just what that has to do with the question of couplers. Mr. O'Neil: It has this to do with couplers. When you are dealing with the question of couplers it is a mere matter of an invention to save human life, and if that can be accomplished by rails on the tops and sides of cars it is a matter to be considered in that connection. (p. 6, 7) * * * Mr. O'Neil: Now, speaking about different couplers, all are liable to get out of order, and then you have got to come back to the link and pin. I have talked with railroad men in my section, and they attach a good deal of importance of the question of having something to catch hold of. Sometimes there is a ladder on one end. But generally when they go in between the cars to couple and they slip or the train starts they

have nothing in the world to catch hold of. Mr. Downey: (representing the Switchmen's Mutual Aid Association of North America). He simply has the side of the car to catch hold of. Mr. O'Neil: Do you not think that if there was a rail along the side of the car it would save a great many lives? Mr. Downey: Yes, sir. (P. 13, 14) * * *

"Mr. Moseley: (Secretary of Interstate Commerce Commission) * * * There is just one other matter of which I wish to speak. It was called to our attention the other day by Mr. O'Neil of Missouri, that is the matter of grab-iron handles or something of that sort. Members of the Master Car Builders' Association have, I understand, recommended at their meetings that freight cars should have a handhold, or something that the switchman can take hold of if he slips when between the cars, instead of trying to clutch hold of the side of a perhaps icy car.

"This, I believe, is a most important matter, now that the car coupler is in a transition state and the men are being constantly called upon to couple different types of couplers together, necessitating their going between the cars more than ever, and vastly increasing the risk, the very thing which all of the representatives of the men who have been before you complain of. Until uniformity is brought about, until every car in the country is equipped with a coupler that interchanges perfectly and automatically with every other coupler in use the increased risk continues." (P. 54).

(Transcript of hearing before Committee on Interstate and Foreign Commerce of House of Representatives relating to bill for protection of trainmen providing for the adoption and use of a uniform standard automatic car coupler and continuous brakes, Government Printing Office, 1892).

On June 27, 1892, the committee, through its chairman, Representative O'Neil, reported, in lieu of H. R. 7512, 6648, 6187, 582, 117, 180 and S. 2951, a bill (H. R. 9350) recommending

passage (C. R., V. 23, Pt. 6, p. 5519). On July 8, 1892, under a suspension of the rules, H. R. 9350, as reported by the committee, was passed by the House and the bill and committee report (House Report 1678) were incorporated in the Congressional Record (C. R., V. 23, Pt. 6, pp. 5925, 5926, 5927). In this report the sole reference to handholds is:

> "5. Handholds.—Until the changes contemplated by this bill can be effected, and with a view to minimize the dangers by every means possible, we recommend a requirement of hand grabs or hand irons on all cars, something that the switchman or brakeman can seize to if he slips instead of trying to clutch the side of a wet or perhaps icy car". (C. R., V. 23, Pt. 6, p. 5926 bottom, 5927 top).

In H. R. 9350 as passed by the House, the section relating to handholds read as follows:

> "Sec. 9. That from and after the first of July, 1893, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure handholds in the ends and sides of each car." (C. R., V. 23, Pt. 6, p. 5925).

H. R. 9350 was referred to the Senate, by it referred to its Committee on Interstate Commerce, a hearing held thereon before that committee (Hearings before the Committee on Interstate Commerce of the United States Senate on bill relating to automatic couplers, continuous train brakes, etc., Government Printing Office, 1892), a report (S. R. 1049) thereon filed with the Senate and the bill then went over to the next session of Congress (C. R., V. 23, Pt. 7, p. 6483, 6552, 6957, 6958). At the second session of the Fifty-second Congress bill H. R. 9350 was considered by the Senate as a committee of the whole, amended, debated and passed by the Senate and, as amended, debated and repassed by the House and approved by the Presi-

dent, Mar. 2, 1893 (C. R., V. 24, Pt. 2, p. 1175, 1246-1252 incl., 1273-1289 incl., 1322-1335 incl., 1359-1376 incl., 1416-1426 incl., 1477-1486 incl., 1741-1743 incl., Pt. 3, p. 1953-1994 incl., 2239-2248 incl., 2262, 2290 and 2457).

In H. R. 9350, as amended by the Senate, Sec. 9 thereof as originally passed by the House became Sec. 4 and as amended read:

> "Sec. 4. That from and after the first of July, 1893, until otherwise ordered by the Interstate Commerce Commission it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grabirons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars." (C. R., V. 24, Pt. 2, p. 1246-1252 incl.)

At the hearing on this bill before the Senate Committee, in the committee's report (S. R. 1049) and in the debate in the Senate the only mention made of the handholds provision was the following comment in debate on Feb. 10, 1893:

> "Senator McPherson: Sec. 4 provides that they shall provide grabirons or handholds at the ends and sides of each car. Nobody disputes but that this is a proper subject of legislation." (C. R., V. 24, Pt. 2, p. 1416 to 1426 incl.)

The legislative history preceding the passage of the Act of Mar. 2, 1893, conclusively shows that the purpose for which handholds or grabirons were required in the Act was to provide an appliance to grasp by the hand to remedy the evil and eliminate the risk incident to men when between cars.

It was then the intention of Congress to require such handholds only until all cars had been equipped with automatic couplers which it was assumed would obviate the necessity for men going between the ends of cars and eliminate the evils this statute was intended to remedy. With the advent of continu-

ous train air brakes and the necessity for coupling air hose and inspection of safety appliances and underrigging of cars it was still necessary for men to go between cars. Recognizing this the Commission did not "otherwise order", but as the subsequent narration of the legislative history preceding the passage of the 1910 Act will indicate, recognized the need for standardizing the location of sill steps, ladders and running boards and placing handholds at locations where they could be used and were necessary even when men were not engaged in coupling operations.

(d) *Legislative history and significant events preceding Safety Appliance Act, 1910, and Safety Appliance Standards Order confirms intent of Congress and understanding of Commission that language of handhold statute be given known and ordinary significance.*

In the Commission's annual report, 1901, attention of Congress is directed to the following quoted language, from a decision of the appellate court, 3rd district of Illinois, involving injury to a brakeman due to the absence of a handhold on an engine tender as indicative of the need for legislation requiring handholds on locomotive tenders: "From his testimony it appears that while stooping over to make a coupling, one foot by reason of the uneven condition of the ground slipped, and as there was no grabiron for him to hold to he was pitched forward and had his hand mashed." (Annual Report of Interstate Commerce Commission, 1901, p. 68, 287).

The Commission's annual report for 1902 directs the attention of Congress to the lack of uniformity in the location of ladders and roof handholds and urges legislation requiring a uniform location of these handholds. (Annual report of Interstate Commerce Commission, 1902.)

The Commission's annual report for 1903 contains a letter from its Secretary advising an official of the New York Central that if the coupling lever at the front of a locomotive is properly located and contains a 2½ inch clearance, it may be used for a handhold (Annual Report of Interstate Commerce Commission, 1903, Appendix "D", p. 339).

The Commission's annual reports for 1905, 1906, 1907 and 1908 recommend that sill steps, ladders and roof handholds be placed under statutory regulation, as was then the case with side and end handholds (Annual Reports of Interstate Commerce Commission, 1905, 1906, 1907 and 1908).

The Commission's annual report for 1909 refers to the decision of the Federal District Court for the District of Massachusetts in United States v. B. & Me. R. R. Co., holding that, if a ladder rung or brake lever is available for use as a grabiron or handhold the provisions of Sec. 4 of the Act of Mar. 2, 1893 are complied with, and makes this comment on that decision: "The decisions of the lower courts on the application of grabirons are conflicting. The Supreme Court of the United States however in the Taylor case has decided that the safety appliance law supplants the common law rule of reasonable care on the part of the employer as to providing appliances defined and specified thereon. * * * This decision must be taken as authoritative and the Commission can only conclude that when Congress specified grabirons in Sec. 4 of the law it meant grabirons and not other appliances. The Commission, therefore, cannot accept the rule of the Master Carbuilders' Association which permits certain appliances to be used as substitutes for the grabirons and will insist that grabirons be applied wherever the law requires them." In the same report in commenting on the decision of another Federal District Court it stated: "It must be inferred that when the Congress made

this requirement it meant grabirons and not uncoupling levers, step brackets, brake staffs or other appliances which were at the time used and well known." (Annual Report of Interstate Commerce Commission, 1909, p. 41, 42).

In response to the Commission's continued recommendations to standardize the location of handholds and place under statutory Federal regulation sill steps, running boards, ladders, etc., H. R. 26725 was introduced in the House, referred to its Committee on Interstate Commerce and a hearing thereon held before the committee on February 5th, 6th and 13th, 1909. The following statements made at the hearing are again illustrative of the intended use then assigned to the handholds we are now considering:

> Frank C. Hawley (International President of the Switchmen's Union of North America): "My position is that owing to the many forms under which * * * grabirons, or as they are called handholds, are placed upon cars, that the power of designating a place should be reposed in the Interstate Commerce Commission." (p. 6).
>
> H. R. Fuller (National Legislative Representative of the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Railway Trainmen): "This bill now before you proposes to give the Interstate Commerce Commission the authority to fix these standards and in view of our experience and the history of this legislation we believe that if we pass this bill in its present form the Master Carbuilders' Standards, some of which are objectionable to the men I represent, will be made the law * * *. The Master Carbuilders' Standards provide for grabirons under the end sill on a certain class of cars, and we think that this is dangerous. This represents the end sill (indicating to the committee) a grabiron bolted underneath that end sill; in order to give the lag screws the proper hold it has got to be set in somewhat from the edge and, consequently when a

man needs it he must put his hand under the end sill to get hold of it and we think that is wrong." (P. 24). (Transcript of hearings before the Committee on Interstate and Foreign Commerce of the House of Representatives on Safety Appliances, February 5th, 6th and 13th, 1909, Government Printing Office, 1909).

As the result of the evidence at this hearing and the recommendations of the Commission, the Act of 1910 became a law on Apr. 14, 1910. Except as above indicated, the legislative history leading up to the passage of this Act makes no mention of the use for which handholds were intended (C. R., V. 45, Pt. 1, p. 137, 159, 160, 161, 194, Pt. 2, p. 2065, 2158, 2159, Pt. 3, p. 2302, 2306, Pt. 4, p. 4216, 4217, 4242, 4243, 4256, 4257, 4377, 4378, 4446).

This Act authorized the Commission, after hearing, to fix the location, etc., of the safety appliances required by the Act of Mar. 2, 1893 (handholds or grabirons), and the Act of Apr. 14, 1910 (ladders, sill steps, running boards and handbrakes). The hearing required was held before the Commission at Washington on September 29th and 30th, 1910, and thereat the only mention made of handholds and their intended purpose was the following:

"Mr. Moseley: (Secretary of Interstate Commerce Commission), Then why did you require four handholds on each end of a high car? Mr. Belknap: (Chief Inspector of Interstate Commerce Commission), Because under air brake conditions that now confronts us, where men have to couple and uncouple through hose, we have to furnish an element of safety. Placing a handhold 30 inches above the center of a coupler does not furnish any element of safety. We provide that each car shall be equipped with a grabiron on the face, projecting downward or outward, so that he can have a convenient handhold to protect himself from injury. The other handhold on the car

is for the protection of trainmen. Mr. Moseley: In several places you make the recommendation that no allowance is made for wear on handholds. Should there not be an allowance for wear on handholds? Mr. Belknap: I don't think it is possible to wear out a handhold, a roof handhold or a grabiron. I notice they complain that there is no allowance made for wear. We say that it shall be five-eighths inch iron. I don't think it is ever possible to wear out a five-eighths inch handhold or grabiron. Mr. Moseley: Is it used for any other purpose except a handhold? Mr. Belknap: That is all." (P. 165). (Transcript of hearing before the Interstate Commerce Commission in the Matter of Proposed United States Safety Appliance Standards for the Protection of Employes and Travelers upon railroads held at Washington, D. C., Sept. 29th, 30th, 1910).

As the result of said hearing the Commission's Safety Appliance Standards Order of March 11, 1911 (Exhibit 12) was entered and now controls the location, etc., of all safety appliances required on freight cars. (Roberts F. L. C. 2nd Ed., Vol. 2, Appendix Q 2010-2038 incl.)

It will be seen that the legislative history and pertinent events preceding the 1910 Safety Appliance Acts and the Commission's Safety Appliance Standards Order confirm the intention of Congress and the understanding of the Commission that when Congress used the words "handholds" or "grabirons" it intended to designate an appliance to be grasped with the hand and that by the Safety Appliance Acts handholds were required to be secure for that purpose and not for use as a foot brace or support in releasing the brake.

(e) *Form and location of end handhold indicate intent of Congress and understanding of Commission that it be used solely as handhold.*

An examination of Exhibits 8 and 9 (R. 80, 81) indicates that the location and construction of this handhold precludes its safe use as a foot brace or support to secure leverage in releasing a hand brake. It is located 1¾ inches below the surface of the running board on which would be the left foot of a man operating the brake. It is a small rounded iron rod ⅝ inch in diameter with only 2¾ inches clearance from the west edge of the running board. Because of its location and form a man can only place a portion of the ball of his foot in a slanting position on the same. If smooth, worn or slippery it would not provide a safe support to secure any leverage in releasing a brake, and he would have difficulty in retaining his footing to prevent slipping therefrom. It would be an insecure and unsafe device if used for that purpose, while if used for its intended purpose would afford greater security to trainmen.

As the Trial Court aptly stated,

> "The very position and form of a handhold would indicate that it was not intended for that purpose. * * * Congress would not provide a thing that was dangerous in operation as a safety device, and it is quite apparent that it was more or less dangerous for any person to attempt to use it as a brace for this purpose; it might become slack and worn and insecure." (R. 75, 76.)

Congress in passing the Safety Appliance Acts and the Commission in standardizing the location, etc., of safety appliances thereunder was intent on safety. Accordingly the Commission prescribed a running board wide enough and long enough to provide the necessary and safe support for the feet of a trainman in releasing brakes. To sustain plaintiff's claim, we

would be required to assume that Congress and the Commission required handholds as an element of insecurity rather than security, which of course was just the reverse of the intention of each body.

To indicate the inconsistency of the claim that this handhold was furnished and intended to be used as a foot brace it is significant that in strict conformity with the order of the Commission respondent could have affixed this handhold extending downward, in which event it would not have been available for the use to which petitioner put it. Had respondent done so, and assuming it had been intended by Congress and the Commission as a foot brace, respondent would have been guilty of violating the handhold statute by failing to apply it extending horizontally out from the end of the running board so that petitioner could use it for that purpose. (*St. Joseph G. & I. Ry. Co. v. Moore,* 243 U. S. 311). Again, if this handhold had become smooth and slippery although secure and safe as a handhold, it would be unsafe for use as a foot brace, in which event if it was intended by Congress as a foot brace and an employe while using it as such slipped therefrom, respondent would be guilty of violating the handhold statute (*Davis v. Reynolds,* 280 Fed. 363, certiorari denied 258 U. S. 627).

Certainly it cannot be presumed that Congress by the handhold statute intended to effect this anomalous result, or that it would standardize the location of the handhold so that it could only be used as such and at the same time penalize respondent because it was not available for use as a foot brace. If there was necessity for an added appliance in connection with the release of tight brakes this necessity would exist no matter what type of car the brake was located on. We should not assume that Congress would permit an end handhold on 90% of the tank cars that could not be utilized to meet this

necessity, or specify a brake platform on a box car of a lesser width and depth than the running board on this tank car and then fail to provide an appliance for use as a foot brace or support.

When the Commission standardizes an appliance and the railroad meets the standard there is no violation of the Act because it does not furnish something other or different than that required by the Commission. *Mahutga v. M. St. P. & S. S. M. Ry. Co.*, 182 Minn. 362, 234 N. W. 474.

The Commission prescribed the standards and respondent had no discretion but to comply with them. Admittedly, this handhold was an unsafe appliance if used as a foot brace. If we assume Congress intended it for that use then respondent is placed in the anomalous position of having no discretion as to its location, form or dimensions but required to assume the risk of responding in damages to injured employes using it, even though admittedly inadequate and unsafe for that purpose. Certainly we cannot presume that this was the Congressional intent. In addition the use to which petitioner put it would, because of the pressure exerted, have a tendency to loosen and make it defective as a handhold.

We are searching for the intent of Congress and the Interstate Commerce Commission at the time of the passage of the handhold statute and the entry of the Safety Appliance Standards Order. That intent cannot be changed or modified by what a few trainmen, to meet the exigencies of a peculiar case, claim it to be now. We know that by the 1910 Act Congress desired to effect uniformity so that appliances would be located where readily available for their intended use to eliminate insecurity to trainmen. Considering briefly the testimony of petitioner's witnesses in an effort to establish that Congress required the handhold for use as a foot brace, what do we find.

They admit that the handhold was not intended as a foot brace on 90% of the tank cars and that it was intended for a foot brace on the other 10% only when a man could not release the brake with both feet on the running board. Manifestly Congress in requiring the appliance and the Interstate Commerce Commission in prescribing its location and dimensions never intended that the appliance be used as a foot brace. Otherwise it would have required an appliance for that use on all cars and the location and form thereof would have been such as to permit its use for that purpose to effect greater security to trainmen.

Only one logical conclusion can be drawn: that at the time of the passage of the handhold statute Congress intended the appliance it designated as a handhold to be used as a handhold and for no other purpose. The Safety Appliance Acts did not require respondent to maintain secure end handholds for use as foot braces.

(f) *Evil against which handhold statute directed.*

Secure end handholds were required by Congress primarily to correct the evil arising out of men being injured while between cars because they had no uniform or safe appliance to grasp for their protection when they slipped or the cars suddenly moved. This end handhold cannot be used, except by a man at the end of a car. While locations at which the Commission now requires handholds indicates an intent to also provide them for the use of employes when not between cars, there is no intent evidenced to provide them for any other use than as a handhold.

The Coupler Act (Act of Mar. 2, 1893, c. 196, Sec. 2, 27 Stat. 531, 45 U. S. C. A. Sec. 2) was designated to eliminate the risks incident to coupling, and uncoupling and the parting of cars

due to defective couplers. Couplers were not required to remedy any other evil. In the Conarty case (238 U. S. 243) he claimed the right to utilize the coupler to provide a place of safety between cars. He was denied recovery because the risk to Conarty because of insufficient space between cars was not intended to be eliminated by Congress when it required effective couplers.

Similarly, this end handhold was not required to eliminate any risk connected with the absence of a foot brace for use in releasing handbrakes, but on the contrary, was required to provide an appliance for men to grasp for their protection when on or between cars.

The risk, if there was one, due to insufficient footing in connection with the release of brakes, was removed when Congress required secure running boards. If Congress had felt that even after it had required secure running boards this risk was still present and that an additional foot brace was necessary to eliminate it, it certainly would have designated and required for that purpose an appliance safe and adequate for use as a foot brace.

VI. Petitioner Abandoned Claim of Violation of Running Board Statute and Evidence Conclusive He Made No Use of Running Board as Such When Injured.

So far as relevant, the Running Board Statute provides:

> "All cars requiring * * * secure running boards shall be equipped with such * * * running boards". (Act of Apr. 14, 1910, C. 160, Sec. 2, 36 Stat. 298, 45 U. S. C. A. Sec. 11).

In his complaint petitioner alleged a violation of the Running Board Statute and in his petition herein refers to that allegation and quotes a portion of the Act, (Petition, p. 2) but

nowhere else in his petition and brief does he argue this point and in its opinion the Circuit Court of Appeals stated that this claim of negligence was not urged in that court. (R. 110).

The sole relation the running board bore to plaintiff's injury was the fact that it split at the west edge when foot pressure was applied to the end handhold, thereby permitting one end of the handhold to pull out. It is apparent that the running board was intended as a place to stand and walk on and the statute required it to be secure for that purpose only. It was not required to be secure so that an end handhold could be affixed thereto.

> "The law, so far as it relates to running boards, deals solely with the mechanical construction and maintenance of secure running boards. This may mean that it shall be of a safe width, solidly fastened and of material to give fair footing." *Slater v. C. St. P. M. & O. Ry. Co.*, 146 Minn. 390, 178 N. W. 813.

VII. While Using End Handhold as Foot Brace, Petitioner Not One Entitled to Benefit and Protection of Handhold Statute and Violation, If Any, Under Circumstances Not Legal Proximate Cause of Injury.

The requirement for secure end handholds was not directed at any evil arising out of injuries to trainmen due to the absence of a foot brace or support to secure leverage in releasing a handbrake. The Congressional intent in requiring secure end handholds was to provide an appliance to grasp with the hands for the greater security of trainmen while between or beside the ends of cars. Therefore, while using the end handhold as a foot brace to exert pressure thereon to secure leverage in releasing the handbrake—(1) petitioner was not within the class Congress intended to benefit and protect by the requirement for secure end handholds; (2) his injury was not

within the evil against which the provision for secure end handholds was directed; (3) the giving way of the handhold was not a breach of any statutory duty respondent owed him; and (4) the violation of the Act resulting from the insecurity of the handhold when so used was not the proximate cause of his injuries.

Petitioner contends that even though he was using the handhold for a purpose for which it was not specifically required or intended by Congress and he was not one for whose especial protection and benefit the handhold statute was enacted, he may still recover as for a violation of that statute solely because he was injured in line of duty due to the end handhold giving way.

To support this contention he cites *Louisville & Nashville R. Co. v. Layton,* 243 U. S. 617, and *Davis v. Wolfe,* 263 U. S. 239, and argues that the decision of the court below is inconsistent therewith, and with the decisions of this court in *M. & St. L. R. Co. v. Gottschall,* 244 U. S. 66, and *Fairport, P. & E. R. Co. v. Meredith,* 292 U. S. 589. He recognizes that *St. L. & S. Fran. R. R. v. Conarty,* 238 U. S. 243, and *Lang v. N. Y. Cent. R. R.,* 255 U. S. 455, oppose his contention, but claims that the Wolfe decision controls because inconsistent with and later than the decisions in the Conarty and Lang cases.

Analysis will show that the lower court's decision is not inconsistent with what was actually decided in any case cited by petitioner and in principle is supported not only by the Conarty and Lang decisions, but also by those in *Chesapeake & O. Ry. Co. v. Nixon,* 271 U. S. 218, and *Chesapeake & O. Ry. Co. v. Mihas,* 280 U. S. 102. Also that this court in the Layton and Wolfe decisions did *not* go so far as to decide that the failure of a safety appliance to perform an unintended function spells liability merely because an employe suffers injury in line of duty from such failure.

Conarty Decision (238 U. S. 243).

Conarty, a switchman, was injured in line of duty while on the front footboard of a switch engine that came into collision with a box car lacking the coupler knuckle and drawbar, in violation of the Coupler Act. Had they been present sufficient space would have remained between the engine and car to have prevented his injuries. There was no intention to couple the engine to the defective car. Although Conarty was injured in line of duty because of the defective coupler, this Court denied recovery as for a violation of the Coupler Act, stating,

> "Nothing in either provision gives any warrant for saying that they are intended to provide a place of safety between colliding cars" and that Conarty "who was not endeavoring to couple or uncouple the car or to handle it in any way but was riding on the colliding engine, was not in a situation where the absence of the prescribed coupler and drawbar operated as a breach of a duty imposed for his benefit", (238 U. S. 250-251).

Petitioner argues that all this court held was that the defective coupler was not the proximate cause of Conarty's injury, while here the giving way of the handhold was the proximate cause of Swinson's injury. In the Conarty decision this court stated:

> "It is not claimed, nor could it be under the evidence, that the collision was proximately attributable to a violation of those provisions, but only that had they been complied with it would not have resulted in injury to the deceased". (238 U. S. p. 249).

Petitioner fails to distinguish between a violation of the Act due to a breach of duty owed another and the giving way of the handhold while being used for an unintended purpose as a legal proximate cause of injury.

The real basis for the Conarty decision was that the failure to provide an operative coupler to furnish a place of safety between colliding cars was not a breach of any statutory duty owed Conarty. This is shown by the fact that this court cited in support of its holding, *The Eugene F. Moran*, 212 U. S. 466, *Williams v. Chicago & Alton R. R.*, 135 Ill. 491, 24 N.E. 661, and *O'Donnell v. Providence & Worchester R. R.*, 6 R. I. 211, and other authorities, all holding that where a duty is imposed for the protection of persons in particular situations or relations a breach of it which happens to result in injury to one in an altogether different situation or relation is not, as to him, actionable.

When this Court said the collision was not proximately attributable to the violation of the Coupler Act, it meant that the failure of the coupler to perform its intended function did not cause the collision, but only that if it had been present as required by the act it would have provided sufficient space to have averted injury to Conarty. This is evident, because if, Conarty had been on the same footboard but there had been present an intention to couple the switch engine to the defective car, he could have recovered as for a violation of the coupler Act. Why? Because in such case the violation of the Act due to the failure of the coupler on the car to permit automatic coupling would have been the proximate cause of his injuries, although the absence of the coupler would still not have been the real cause of the collision. In that case the coupling apparatus would fail to perform a function intended by Congress and would result in the violation of a statutory duty imposed for Conarty's benefit.

The Layton decision (243 U. S. 617).

All this court decided was that Layton, admittedly injured as the direct result of the failure of two cars to couple auto-

matically on impact, could recover, although at the time not between the ends of these cars engaged in a coupling operation.

The ground of distinguishment between the Layton and Conarty decisions is that recovery was allowed in the Layton case because he was injured as the direct result of the couplers' failure to function when used for their intended purpose, to couple automatically on impact, while in the Conarty case he was injured because of their failure to provide space between cars brought into collision from other causes, which was not the intended purpose of couplers. The carrier breached a statutory duty to Layton when it failed to provide couplers that would couple automatically on impact, while in the Conarty case the carrier owed no statutory duty to equip the defective car with an operative coupler to provide Conarty with a place of safety between the cars.

The Gotschall decision (244 U. S. 66).

Gotschall, a brakeman in line of duty was injured due to the separation of the couplers between two cars on his train. Therein the sole question was whether the mere unexplained separation of the two couplers was proof of a violation of the coupler act. This court held it was: the purpose of the act being to require couplers that would couple automatically and remain coupled. Gotschall was injured as a direct result of the failure of the two couplers to perform this intended function.

The Lang decision (255 U. S. 455).

Lang, a brakeman, in line of duty, was injured while standing on a brake platform at the end of a box car when it collided with another car lacking the coupler knuckle and draw bar, in violation of the coupler act. Had they been intact, sufficient space would have remained between the cars to have prevented

his injury. There was no intention to couple the two cars together.

This court was urged to permit recovery on the claim that in the Layton decision it held that recovery would be allowed whenever a carrier failed to provide a coupler complying with the coupler act, and no injury would have resulted had the act been complied with. This court rejected such unwarranted construction of its language in the Layton decision, and held the Comarty decision controlling, the purpose of couplers not being to provide space between colliding cars.

Neither Lang nor any member of his crew intended to couple the car on which he was riding to the defective car; therefore they were not using, or intending to use, the coupler for the purpose for which it was intended and required by this Act. The mere fact that it was defective did not breach any statutory duty owed Lang under the circumstances. It will be noted that even after consideration of its language in the Layton decision (which petitioner claims supports his contention herein) this court, in the Lang case, held that proof of a breach of a duty was still necessary to permit recovery as for a violation of the Safety Appliance Act. Also that there is no breach of duty to an employe injured because of the failure of a safety appliance to perform an unintended function even though defective for its intended purpose.

The Wolfe decision (263 U. S. 239).

The sole question presented for decision was whether Wolfe, (admittedly injured as the direct result of a defective handhold failing to function for its intended purpose), should be denied relief as for a violation of the handhold statute solely because not at the time engaged in a coupling operation.

This court held that while one of the purposes of the handhold statute was to give greater security to men in coupling

and uncoupling cars, handholds were also required for the security of employes in other than coupling operations. Therefore merely because Wolfe was not engaged in a coupling operation did not prevent the violation of the handhold statute from being a breach of a statutory duty owed him and the proximate cause of his injuries. It is significant that Wolfe, when injured, was using the handhold as a handhold and not as a brace for his foot to exert foot pressure thereon to secure leverage in performing some other operation.

It is the following language from the Wolfe decision, which petitioner claims authorizes recovery by him as for a violation of the handhold statute, although using the end handhold as a foot brace and not for a purpose for which it was intended or required by Congress:

> "* * * he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection". (263 U. S. 239, 243).

This language must be considered in relation to the facts in that case. This court did not mean that an employe using an appliance for a purpose not intended or required by the Act and therefore not one for whose protection it was required to be secure, could recover merely because the appliance failed when so used and caused him injury in line of duty. An employe must be in discharge of duty to be an employe within the purview of the Federal Employers' Liability Act. When this court referred to an "operation" it only meant that to recover it was unnecessary that the employe be engaged in a coupling operation, and no more.

As indicated by the stated purpose of the handhold statute, the primary evil Congress intended to remedy by its provisions was the risk incident to men being required to be between the ends of cars to adjust the old type link and pin coupler. By the Act of 1910, Congress recognized and provided for handholds at locations having no relation to coupling operations, but it has at no time indicated any intent to require a handhold for any use but as a handhold.

That this court did not intend its language in the Wolfe decision to be given the broad construction contended for by petitioner is evidenced by the fact that it therein distinguished its previous decisions in the Conarty and Lang cases and reaffirmed and did not overrule the doctrine set forth in those cases: "* * * the requirement of automatic couplers not being intended to provide a place of safety between cars brought into collision from other causes", 263 U. S. 239, 242. The first above quoted language in the Wolfe decision is based on similar language in the Layton decision. In *C. G. W. R. Co. v. Schendel*, 267 U. S. 287, this court was careful to state that nothing it had said in the Layton decision was intended to modify or overrule anything it had said in the Conary decision.

The Nixon decision (271 U. S. 218).

Nixon, a section man in line of duty, was run down by a train because the engine crew failed to keep proper lookout ahead. The duty to keep this lookout was not for Nixon's benefit, but for that of the public at highway crossings. This Court, in effect, held that while a duty owed the public was violated and the breach of such duty injured Nixon, he could not recover because no duty owed him had been breached.

The Mihas decision (280 U. S. 102).

Mihas, a switch light tender in line of duty was injured while climbing over a coal car standing with a number of others, when they were suddenly and without warning moved by the trainmen. It was customary for trainmen before moving cars at this location to personally notify persons engaged in unloading same. Had this notice been given, presumably it would also have protected Mihas. Such notice, however, was exclusively for industry employes. Following its decision in the Nixon case and citing *O'Donnel v. Providence & W. R. R. Co.*, 6 R. I. 211, this Court held that the breach of a duty owed another, did not entitle Mihas to recover, and in effect that the carrier was not required to anticipate that the violation of the duty owed such other would cause injury to Mihas.

The Meredith case (292 U. S. 589).

Miss Meredith was struck at a highway crossing due to the failure of a train to slacken its speed or stop because the automatic air brakes were not properly connected and functioning. It was urged that she was not one entitled to the protection of the Safety Appliance Act requiring efficient automatic train air brakes because the Act's title stated it was for the protection of employes and passengers on railroad trains. This court held that the real purpose of automatic train air brakes was to enable the locomotive engineer to control the speed of and stop the train should occasion require and that a traveler at a highway crossing needed such protection as much as an employe or passenger. This court was careful to state that liability from the statutory violation only arose for an injury resulting therefrom to a person falling within the terms and intent of the act. It cited the Layton, Wolfe, Conarty and Lang cases under the assumption that all were consistent. Miss

Meredith was injured as the direct result of the failure of the air brakes to function for their intended purpose. Manifestly, if she had attempted to place her foot on the air hose in climbing between cars, and had been injured due to the disconnected air hose, she would not have been entitled to the protection of the act, although the failure to have the air hose connected would be a statutory violation. Under those circumstances she would be claiming the right to use the air brake apparatus for a purpose for which it was not intended or required by the act and the carrier owing no duty to connect the hose for that purpose would not be required to foresee injury to her because of its failure to comply with the act.

Petitioner cites *Lehigh Valley R. Co. v. Howell*, 6 Fed. (2d) 784 (C. C. A. 3); *Chesapeake & O. Ry. Co. v. Smith*, 42 Fed. (2d) 111 (C. C. A. 6); *McNaney v. C. R. I. & P. R. Co.*, 132 Minn. 391, 157 N. W. 650; *Clapper v. Dickinson*, 137 Minn. 415, 163 N. W. 752, and *Frye v. C. R. I. & P. Ry. Co.*, 157 Minn. 52, 195 N. W. 629. Although decisions of lower courts and therefore not controlling here respondent will briefly discuss them.

The *Howell case* (6 Fed. (2d) 784).

Howell, while stepping from the end ladder on a freight car to the brake platform preparatory to releasing the handbrake, placed his hand on the brake wheel to pull on it to release the brake and incidentally used it as a support to assist him in completing his climb. As he did so the ratchet rose up over the pawl causing the brake to unwind and injuring him. The brake was defective for its intended purpose. It was urged that because Howell used the brake wheel as a handhold, he was not using the brake for the purpose it was intended and

required by the handbrake Act and, therefore, could not recover. The appellate court recognized that if he used the handbrake primarily and solely as a handhold he might not be entitled to recover. It held that in fact at the time of injury he was proceeding to release the brake and had hold of the brake wheel to pull on it for that express purpose and that merely making an incidental use of it as a support in climbing to the brake platform did not show that he was not using the brake for its intended purpose nor preclude recovery as for a violation of the handbrake statute.

The *Smith case* (42 Fed. (2d) 111).

Smith, while riding in a caboose was injured because of an unexpected and abrupt reduction in speed due to defective train air brakes. The air brake act requiring automatic train air brakes to enable the locomotive engineer to "control its speed without requiring brakemen to use the common hand brake for that purpose", was relied on to support recovery. It was urged that because the defective air brakes did not require a brakeman to use the common handbrake to control the train's speed, Smith was not entitled to the protection of the Act. Recovery was allowed. His injury was the direct result of the air brakes' failure to function for their intended purpose: to control the speed of the train for the safety of employes.

The decisions in the McNaney (132 Minn. 391, 157 N. W. 650) and Clapper (137 Minn. 415, 163 N. W. 752) cases were based almost entirely on the Layton decision. What has been said herein with reference to the Layton and Wolfe decisions applies equally to the Clapper and McNaney decisions.

The Frye case (157 Minn. 52, 195 N. W. 629) involves an entirely different safety appliance act (Boiler Inspection Act) requiring every locomotive, boiler, tender and all parts and

appurtenances thereof to be in proper condition and safe to operate *in the service to which the same were put*, so that they might be employed in the actual service of the carrier without unnecessary peril to life or limb. The Minnesota supreme court held that the appliance involved was defective in the service to which the carrier had put it and Frye having been injured because of such defect, was one for whose benefit the provision of the Boiler Inspection Act, relied on, was enacted.

The claimed inconsistency between the Layton, Goftschall, Wolfe and Meredith decisions, on the one hand, and the Conarty and Lang decisions, on the other, does not exist.

Recovery was allowed in the first mentioned cases because the injuries resulted from the failure of the appliance to perform its intended function, while in the Conarty and Lang cases recovery was denied because the injuries resulted from the failure of the appliance to perform an unintended function. Stated differently, the employes in the first mentioned cases were injured as the direct result of the breach of a statutory duty owed them, while Conarty and Lang were injured as the result of a breach of statutory duty owed someone else. Therefore, Layton, Gottschall, Wolfe and Miss Meredith, when injured, were persons for whose benefit and protection the safety appliances involved were required by Congress, while neither Conarty nor Lang, when injured, was a person for whose benefit and protection Congress required operative couplers.

VIII. Result of Perversion of Congressional Intent With Respect to Safety Appliances.

A few examples will best indicate the result of adopting petitioner's contention herein.

Assume a locomotive water gauge defective in violation of the Boiler Inspection Act. An employe in line of duty uses it as a foot brace and it gives way causing him injury. Under petitioner's theory its failure would entitle him to recover as for a violation of the Boiler Inspection Act even though the injury resulted from such unintended and absurd use.

Assume that a chain is attached to a defective handhold to move a car. It fails when being so used, and causes injury to an employe in line of duty. Under petitioner's theory the injured employe may recover as for a violation of the handhold statute, although it is manifest the handhold was not required to assist in moving cars.

Assume a car in use with a missing or defective coupler in violation of the coupler act. An employe in line of duty attempts to step on it not in connection with a coupling operation and its absence or defective condition causes him injury. Under petitioner's theory he could recover as for a violation of the coupler act, although Congress never intended to provide couplers as stepping blocks.

Instances could be multiplied, but the foregoing sufficiently indicates the path along which petitioner would lead this court.

Petitioner not only was using the handhold for an unintended purpose, but was willfully misusing it. The natural tendency of such mis-use would be to make defective a handhold otherwise safe and secure for its intended purpose.

CONCLUSION.

It is too clear to require further argument that petitioner's injury resulted from the use of the end handhold for a purpose for which it was not intended or required by Congress. It follows that there is no substantial evidence of actionable negligence, because respondent owed no statutory duty to furnish petitioner with a secure end handhold, or any handhold at all, for use as a brace upon which to exert foot pressure in releasing a hand brake, and any violation of the handhold statute which may have resulted from respondent's alleged failure to furnish a secure end handhold for use as a handhold was not the legal proximate cause of petitioner's injury.

The judgment of the court below is supported in principle by the Conarty, Lang, Nixon and Mihas decisions, and by the other decisions cited under III and IV hereof, and should be affirmed.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
NELSON J. WILCOX,
Of Counsel.

FILE COPY NOV 3

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383.

G. D. SWINSON,

Plaintiff in Error,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Defendant in Error.

MOTION TO ADVANCE CAUSE FOR HEARING; AFFIDAVIT OF ERNEST A. MICHEL IN SUPPORT THEREOF AND NOTICE OF MOTION.

TOM DAVIS,
ERNEST A. MICHEL,
Attorneys for Plaintiff in Error,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383.

G. D. SWINSON,

Plaintiff in Error,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Defendant in Error.

Now comes the above named plaintiff in error and respectfully moves the Court to advance this cause for hearing to as early a date as to the Court may seem advisable; said motion is based on the ground that the cause is not of a character to require extended argument and on the affidavit of Ernest A. Michel, one of the counsel for plaintiff in error which is hereto attached and made a part thereof.

TOM DAVIS,
ERNEST A. MICHEL,
Attorneys for Plaintiff in Error,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

Supreme Court of the United States

OCTOBER TERM, 1934.

G. D. SWINSON,

Plaintiff in Error,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Defendant in Error.

STATE OF MINNESOTA,

ss.

County of Hennepin.

ERNEST A. MICHEL, being first duly sworn, deposes and says that he is one of the counsel for the above named plaintiff in error, G. D. Swinson; that said Swinson while an employee of defendant in error was injured on the 17th day of September, 1932; that his right foot has been amputated as a result of the injuries sustained by him.

Affiant further states that he personally knows the financial condition of said G. D. Swinson and that other than aid received through the United States Veterans Bureau and friends he has no means of making a livelihood or caring for himself.

Affiant further states that the next term of the United States District Court for the Fourth Division convenes on the first Tuesday in March; that this case was tried in said Court and that if the judgment appealed from be reversed it is the desire of plaintiff in error and his counsel that said

cause be tried at said March term; that if such reversal of the judgment be had appropriate proceedings must further be had by the Circuit Court of Appeals to the end that said cause be sent back to the District Court for trial.

Affiant further says that the question for determination herein, although of great importance, is simple and may be adequately presented in less time than usually allotted for oral arguments in this Court.

ERNEST A. MICHEL.

Subscribed and sworn to before me this 29th day of October, 1934.

SIDNEY S. FEINBERG,
Notary Public,
Hennepin County, Minn.

My Commission Expires Nov. 23, 1938.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

G. D. SWINSON,

Plaintiff in Error,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Defendant in Error.

NOTICE OF MOTION.

The defendant in error is hereby notified that plaintiff in error will, on the 5th day of November, 1934, on the convening of the Supreme Court of the United States on that date, or as soon thereafter as counsel may be heard, submit for the consideration of the Court the foregoing and annexed motion and the affidavit in support thereof.

TOM DAVIS,
ERNEST A. MICHEL,
Attorneys for Plaintiff in Error,
419 Metropolitan Bank Building,
Minneapolis, Minnesota.

FILE COPY

NOV 5

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S MOTION TO ADVANCE.

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent
400 West Madison Street,
Chicago, Illinois.

NELSON J. WILCOX,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
275 East Fourth St.,
St. Paul, Minnesota.
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITIONER'S MOTION TO ADVANCE.

A copy of petitioner's motion to advance the above case for hearing was served upon respondent's counsel in Minnesota, October 30, 1934, returnable November 5, 1934.

This case does not involve any matter of general public interest. There are no reasons why the case should be advanced, the alleged reasons set forth in the affidavit not being sufficient to justify this Court in laying aside its work of great public moment in order to take up this case out of its turn. Especially is this so at the present time when (a) the Court has before it and will have before it some of the most important cases in its history, and (b) the Court is fully abreast of its work

and in the ordinary course this case will not be long delayed. If petitioner, as indicated in the affidavit attached to the motion, will not require the full time alloted to him for argument, respondent will appreciate being granted such of petitioner's unused time as the Court may consider proper.

There is no substantial reason why the case should be advanced. The motion should be denied.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
Attorneys for Respondent
400 West Madison Street,
Chicago, Illinois.

NELSON J. WILCOX,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
275 East Fourth St.,
St. Paul, Minnesota.
Of Counsel.

FILE COPY

Office Supreme Court
FILED
APR 4
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 383

G. D. SWINSON,

Petitioner,

vs.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

PETITION OF RESPONDENT FOR REHEARING AND CERTIFICATE OF COUNSEL.

SAMUEL H. CADY,
WILLIAM T. FARICY,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME,
275 E. 4th Street,
St. Paul, Minnesota.
Attorneys for Respondent.

NELSON J. WILCOX,
Of Counsel.

CHICAGO LAW PRINTING CO., 111 NORTH WACKER DRIVE (COR. WASHINGTON ST.)

SUBJECT INDEX.

PAGE

PETITION FOR REHEARING

This Court's opinion 1

I. No substantial evidence that handhold was not secure for use strictly as such 2

II. If congressional intent is to depend on the finding of a jury, construction of the safety appliance acts will not be uniform throughout the United States 3

III. The opinion disregards previous decisions holding breach of duty imposed for benefit of one person, no basis for recovery by another, even though performance of such duty would have averted injury to such other person 4

IV. No substantial evidence of custom 6

Conclusion and Prayer 7

Certificate of counsel 8

CASES CITED.

Chesapeake & O. Ry. Co. v. Mihas, 280 U. S. 102 5

Chesapeake & O. Ry. Co. v. Nixon, 271 U. S. 218 5

Chicago, M. & St. P. Ry. Co. v. Lindeman, 143 Fed. 946 7

Davis v. Wolfe, 263 U. S. 239 5

Fairport, P. & E. R. R. v. Meredith, 292 U. S. 589 5

Federal Reserve Bank v. Malloy, 264 U. S. 160 7

Lang v. N. Y. Cent. R. R. Co., 255 U. S. 455 5

St. L. & San Fran. R. R. v. Conarty, 238 U. S. 243 5

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 383

G. D. SWINSON,

Petitioner,

VS.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY,

Respondent.

PETITION FOR REHEARING.

Comes now the above named respondent, Chicago, St. Paul, Minneapolis & Omaha Railway Company, and presents this its petition for a rehearing of the above entitled cause and in support thereof respectfully shows:

This Court's Opinion.

In the opinion filed March 11, 1935, this Court holds that because there was evidence on which the jury might have found (1) that the handhold was not secure for use strictly as a handhold (2) that use of the handhold as a foot brace was a customary, natural and not unusual one; (3) that such use did not subject the handhold to appreciably greater

strain than when used strictly as a handhold (4) therefore for such use of the handhold Swinson was entitled to assume it was secure; and as failure of the handhold was the proximate cause of his injury, the trial Court erred in directing a verdict for respondent.

I.

No substantial evidence that handhold was not secure for use strictly as such.

When used strictly as a handhold the employe would grasp it with his hand while standing with both feet on the ground. Manifestly any testimony with respect to the comparative strain on the handhold while being used as a foot brace and while being used to grasp with the hand must be mere speculation. No effort was made to use the appliance as a handhold and, therefore, no one knew or could express an opinion as to whether it was secure for that purpose. No one knows how much foot pressure Swinson exerted on the handhold when it gave way. When originally affixed the handhold might have withstood foot pressure far in excess of that to which Swinson subjected it. After being in use for some time it might not withstand such foot pressure and yet be secure for use strictly as a handhold.

Swinson admits that on the morning of the day of the accident he applied foot pressure to the handhold and it appeared to be secure (R. p. 9-10). This would indicate it was secure for use strictly as a handhold. Other than the testimony relative to the condition of the running board after the accident, the only other testimony relating to alleged insecurity for use strictly as a handhold was that of the witness Lush. He expressed the opinion that *a* grab-

iron used in the usual and ordinary way should sustain more strain than a man could exert on it in releasing a brake (R. p. 63). Whether it would or not this is far from proof that this handhold was insecure for use strictly as such. In the absence of proof that prior to the accident the handhold was hanging down or in such condition as to make is obviously insecure for use strictly as a handhold and in the face of Swinson's admission that on the morning of the accident it withstood foot pressure without evidencing any insecurity, how can a jury be permitted to enter the realm of speculation and find that it was insecure as a handhold merely because it gave way under the foot pressure exerted. Such foot pressure itself would tend to make insecure a handhold otherwise secure for its intended use.

II.

If congressional intent is to depend on the finding of a jury, construction of the Safety Appliance Act will not be uniform throughout the United States.

This Court was asked to construe the Safety Appliance Act so as to determine the intent of Congress as to the purpose for which secure handholds were required. In effect it held that Congress intended the handhold to be secure so as to withstand the strain incident to its use strictly as a handhold, but in the opinion permits recovery for injuries resulting from its failure when being used for any purpose which a jury may find is customary, natural and usual, and this notwithstanding the fact that when the Act was passed such use was unknown and not contemplated and Congress later required, in other Acts, appliances for employees to stand, walk and brace their feet upon.

A jury in Minnesota may find that use of the handhold as a foot brace is a customary, natural and usual one, while a jury in Illinois may find the reverse. In the one State the employee is protected by the Act and in the other he is not. In the one State the jury legalizes this unsafe practice and in the other it does not.

Whether the employee is entitled to the protection of the Act depends upon the finding of a group of laymen, the jury. Certainly, Congress intended the Safety Appliance Act to have uniform application to all within its purview and did not intend to limit its protection to those whose use of the appliance a jury should find was usual, customary and natural years after the Act's passage.

Under the Court's opinion, except where the handhold is being used strictly as such, the Act will receive as many different constructions as there are juries to pass upon the question of use.

III.

The opinion disregards previous decisions holding breach of duty imposed for benefit of one person, no basis for recovery by another, even though performance of such duty would have averted injury to such other person.

Under the opinion a jury might find that the violation of the Safety Appliance Act consisted of respondent's failure to maintain the handhold secure for use strictly as a handhold. Stated differently the holding is that because Swinson's injury was due to the insecurity of the handhold for use strictly as a handhold, he may recover if the strain he subjected it to was not appreciably greater than that incident to its use strictly as a handhold.

The decisions of this Court in *St. L. and San Fran. R. R.* v. *Conarty*, 238 U. S. 243, *Lang* v. *N. Y. Cent. R. R. Co.*, 255 U. S. 455, *Chesapeake & O. Ry. Co.* v. *Nixon*, 271 U. S. 218, and *Chesapeake & O. Ry. Co.* v. *Mihas*, 280 U. S. 102, are to the contrary. In each of these cases the employe's injury was due to a breach of duty owed another. There, as here, the performance of the duty to another would have averted the injury.

The couplers involved in the *Conarty* and *Lang* cases were defective in violation of the Safety Appliance Act relating to couplers. Had they not been, neither Conarty nor Lang would have been injured. At the moment of accident these couplers were not subjected to any test more severe than that incident to a coupling operation. This Court denied recovery as for a violation of the Coupling Act, not because the coupler if intact would not have afforded the protection necessary to avert injury to these employes, but solely because they were attempting to utilize the couplers for a purpose for which Congress did not require them.

Likewise in the *Nixon* and *Mihas* cases the employes involved would not have been injured had the carrier performed the duty it owed someone else. This Court denied recovery because no duty owed Mihas and Nixon had been violated.

Here the question is not whether Swinson was injured due to respondent's failure to maintain the handhold secure for use strictly as such, but rather whether Congress required the handhold to be secure so that he could exert foot pressure thereon.

Neither *Fairport, Painesville & Eastern R. R.* v. *Meredith*, 292 U. S. 589, or *Davis* v. *Wolfe*, 263 U. S. 239, support so liberal a construction of the Acts. In both the proximate cause of injury was a failure of the instrumen-

tality involved to function for its recognized and intended purpose. The only question presented for decision in the *Wolfe* case was whether the Safety Appliance Act relating to handholds was intended for the protection of men not engaged in coupling operations. Neither of these decisions authorizes recovery by one for a breach of a duty owed another. The Safety Appliance Act requires a secure handhold. Manifestly secure for use strictly as a handhold. If it was intended and must be secure for use as a handhold, then it must be apparent that this Court should not extend the intent of Congress so as to include any use which a jury may find customary and natural.

IV.

No substantial evidence of custom.

Admittedly on 90% of the tank cars in use there was no custom to use the handhold as a foot brace because on these cars it could not be so utilized. Swinson's sole reference to any custom was his statement that he was doing the work of releasing the brake in the customary and usual manner and had seen hundreds of men do it in the same way (R. p. 7). Lush, that where the handhold was in a horizontal position it was customary to use it in setting and releasing brakes (R. p. 62). Other of plaintiff's witnesses had so used it numerous times and had seen others so use it. The so called custom only applied when the brake was so tight that sufficient leverage could not be obtained while standing with both feet on the running board. We submit there is insufficient evidence of such a custom as to charge the respondent with notice that the small portion of the 10% of the cars might occasionally be so used or to require it to recognize this dangerous practice. Certainly it does

not meet the test laid down in *Chicago, M. St. P. Ry. Co.* v. *Lindeman,* 143 Fed. 946 (C. C. A. 8) cited with approval by this Court in *Federal Reserve Bank* v. *Malloy,* 264 U. S. 160-170.

Conclusion and Prayer.

We respectfully direct the Court's attention to (1) the effect of its opinion as a departure from and an extension of the original intent and purpose of the Safety Appliance Acts, (2) the lack of uniformity which will result in the interpretation of the acts in the various states, (3) the inconsistency of the opinion with the Court's previous decisions hereinbefore cited.

The present opinion will require the railroads to submit to any use of a safety appliance that their employees desire to make of it even though such use creates greater hazards to the employee than those the Acts were intended to eliminate. The location, position, and design of this handhold makes it obvious that it is inadequate and unsafe for use as a foot-brace and, such use tends gradually to make it insecure for use strictly as a handhold.

If this Court is unimpressed with the other matters presented in this petition, at least it should not foreclose respondent with respect to the degree of proof necessary in relation to the alleged insecurity of the handhold for use strictly as such and in regard to the alleged custom.

It is of great importance to the railroads of the country that the questions here involved be correctly and definitely decided. It is urged that this opinion's departure from the Court's previous holdings and construction of the Acts should not be finally adopted, at least until the Court has had the benefit of further argument specifically directed to the effect of the opinion and has given further detailed consideration to the matter in the light of such argument.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the decree of the Circuit Court of Appeals be, upon further consideration, affirmed.

Respectfully submitted,

SAMUEL H. CADY,
WILLIAM T. FARICY,
400 West Madison Street,
Chicago, Illinois.

WARREN NEWCOME
275 E. 4th Street,
St. Paul, Minnesota,
Counsel for Respondent.

NELSON J. WILCOX,
Of Counsel.

Certificate of Counsel.

I, Warren Newcome, of counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

WARREN NEWCOME,
of Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 383.—October Term, 1934.

G. D. Swinson, Petitioner, *vs.* Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	On Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[March 11, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

Swinson, a freight brakeman in the employ of the Chicago, St. Paul, Minneapolis and Omaha Railway, brought this action under the Federal Employers' Liability Act, in the federal district court for Minnesota. The accident occurred while he was releasing a handbrake at the end of a tank car. The brake was tightly set. To release it required the application of considerable force to the brake wheel. In order to exert such force, Swinson placed his left foot on the running board, his right foot on a grabiron or handhold, which consisted of a round iron bar bent at the ends, attached horizontally to the under side of the running board, and extending beyond it a few inches. As he exerted foot pressure on the grabiron, the plank to which it was attached split, and one of the bolts securing the grabiron pulled through. As a result, he lost his balance, fell in front of the moving car and was seriously injured. The parties were engaged, and the car was used, in interstate commerce.

Swinson claimed that the Railway was liable, independently of negligence on its part, because it had failed to provide the "secure grabiron or handhold" required by the Safety Appliance Act.[1] The Railway contended that it was not liable because the grabiron had been used by Swinson for a purpose for which it was not intended; since the purpose of Congress in requiring "secure grab irons or handholds" was to supply an appliance to grasp with the hands, not to provide a foot brace or support to secure leverage in

[1]Section 4 of the Federal Safety Appliance Act, Act of March 2, 1893, c. 196, § 4, 27 Stat. 531, provides that "Until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

releasing a handbrake. Although there was evidence that the grabiron was inadequate and defective even for its so-called "intended use" of being grasped by the hands, and also evidence that the use which Swinson had made of the grabiron was customary, the trial court sustained the Railway's contention and directed a verdict for it. The Court of Appeals affirmed the judgment entered upon the verdict, 72 F. (2d) 649. Certiorari was granted, 293 U. S. —, because the precise question, which is of importance, had not been decided by this Court.

The Safety Appliance Act has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act. Thus, although the Act was intended primarily for the protection of railroad employees, it was held in *Fairport, Painesville & Eastern R. R.* v. *Meredith*, 292 U. S. 589, that a traveller on the highway could recover for injury resulting from failure to maintain in usable condition the power brake required by the Safety Appliance Act. Although this section of the Act was originally intended for "greater security to men in coupling and uncoupling cars", it was held in *Davis* v. *Wolfe*, 263 U. S. 239, 243, that a freight train conductor could recover for an injury resulting from failure of a grabiron, which he had grasped while standing on the sill-step and signalling the fireman. There, the Court said that an employee "can recover, if the failure to comply with the requirements of the act is a proximate cause of the accident, resulting in injury to him while in the discharge of his duty, although not engaged in an operation in which the safety appliances are specifically designed to furnish him protection."

As failure of the grabiron was the proximate cause of the injury, it was error to direct a verdict for the defendant. There was evidence on which the jury might have found that the grabiron was not secure for use strictly as a handhold; and that if it had been, it would not have failed, since the use made of it by Swinson did not subject it to appreciably greater strain. There was evidence, also, that use as a foot brace was a natural and not unusual one. For such a use of the grabiron, Swinson was entitled to assume that it was secure. Compare *Lehigh Valley R. R. Co.* v. *Howell*, 6 F. (2d) 784; *Didinger* v. *Pennsylvania R. R. Co.*, 39 F. (2d) 798.

Reversed.